5-18-2011

Johnson v. North Idaho College Clerk's Record v. 2 Dckt. 38605

LAW CLERK Vol 2 of 11

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

VICTORIA JOHNSON,

Plaintiffs/Appellants

vs.

NORTH IDAHO COLLEGE, an Idaho corporation, and DONALD FRIIS, an individual

Defendants / Respondents

Appealed from the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai.

Bruce J. Casleton
950 W Bannock St., Ste 610
Boise, ID 83702

Peter C. Erbland
PO Box E
Coeur d'Alene, ID 83814

Attorney for Respondents

James McMillan
417 Seventh St, Ste 7
Wallace , ID 83873

Attorney for Appellants

38605

Volumn 2

Victoria Johnson vs. North Idaho College, Donald W Friis

Date	Code	User		Judge
9/26/2006		OLSON	Filing: A1 - Civil Complaint, More Than $1000 No Prior Appearance Paid by: Amaro Law Office Receipt number: 0714973 Dated: 9/26/2006 Amount: $88.00 (Check)	Lansing L. Haynes
	SUMI	BARTON	Summons Issued	Lansing L. Haynes
10/17/2006		MCCOY	Filing: I1A - Civil Answer Or Appear. More Than $1000 No Prior Appearance Paid by: Peter Erbland Receipt number: 0717836 Dated: 10/17/2006 Amount: $58.00 (Check)	Lansing L. Haynes
	AFSV	REMPFER	Affidavit Of Service Michael Burke 2 Oct 06	Lansing L. Haynes
	NOAP	MCCOY	Notice Of Appearance - Peter Erbland OBO Donald Friis	Lansing L. Haynes
10/20/2006		ZLATICH	Filing: I1A - Civil Answer Or Appear. More Than $1000 No Prior Appearance Paid by: Naylor & Hales Receipt number: 0718372 Dated: 10/20/2006 Amount: $58.00 (Check)	Lansing L. Haynes
	NOAP	ZLATICH	Notice Of Appearance Bruce Castleton OBO Def North Idaho College	Lansing L. Haynes
10/25/2006	AFSV	SRIGGS	Affidavit Of Service/Donald Friis 10/14/06	Lansing L. Haynes
11/2/2006	HRSC	TAYLOR	Hearing Scheduled (Status Conference 01/08/2007 03:30 PM)	Lansing L. Haynes
		TAYLOR	Notice of Hearing	Lansing L. Haynes
11/3/2006	NOTC	LEITZKE	Notice of Removal and Demand for Jury Trial (Removed to Federal Court)	Lansing L. Haynes
	CVDI	LEITZKE	Civil Disposition entered for: Friis, Donald W, Defendant; North Idaho College, Defendant; Johnson, Victoria, Plaintiff. order date: 11/3/2006	Lansing L. Haynes
	FJDE	LEITZKE	Final Judgement, Order Or Decree Entered	Lansing L. Haynes
	HRVC	TAYLOR	Hearing result for Status Conference held on 01/08/2007 03:30 PM: Hearing Vacated	Lansing L. Haynes
	STAT	TAYLOR	Case status changed: closed	Lansing L. Haynes
11/9/2006	RSCN	PARKER	Response to Status Conference Notice	Lansing L. Haynes
11/13/2006	MISC	SRIGGS	Consent to Removal	Lansing L. Haynes
2/12/2010	ORDR	HUFFMAN	Order Adopting Report & Recommendation	Lansing L. Haynes
7/22/2010	MOTN	HUFFMAN	Defendant North Idaho College's Motion for Summary Judgment	Lansing L. Haynes
	MISC	HUFFMAN	Defendant North Idaho College's Statement of Undisputed Material Facts	Lansing L. Haynes
	MEMO	HUFFMAN	Memorandum in Support of Defendant North Idaho College's Motion for Summary Judgment	Lansing L. Haynes
	FILE	BIELEC	*******File 2 Created********	Lansing L. Haynes
	AFFD	HUFFMAN	Affidavit of Bruce J Castleton in Support of Defendant North Idaho College's Motion for Summary Judgment	Lansing L. Haynes

Victoria Johnson vs. North Idaho College, Donald W Friis

Date	Code	User		Judge
7/27/2010	HRSC	SVERDSTEN	Hearing Scheduled (Motion for Summary Judgment 09/08/2010 03:30 PM) Castleton	Lansing L. Haynes
	STAT	SVERDSTEN	Case status changed: Reopened	Lansing L. Haynes
	NOHG	SREED	Notice Of Hearing Re: Defendant North Idaho College's Motion for Summary Judgment	Lansing L. Haynes
8/25/2010	AFFD	CLEVELAND	Affidavit of James McMillan in Opposition to Defendant North Idaho College's Motion for Summary Judgment	Lansing L. Haynes
	MEMO	CLEVELAND	Plaintiff's Memorandum in Opposition to Defendant North Idaho College's Motion for Summary Judgment	Lansing L. Haynes
	AFFD	CLEVELAND	Affidavit of James McMillan in Opposition to Defendant North Idaho College's Motion for Summary Judgment	Lansing L. Haynes
	MOTN	CLEVELAND	Plaintiff's Opposition to Defendant North Idaho College's Motion for Summary Judgment	Lansing L. Haynes
9/1/2010	MEMO	ROSENBUSCH	Defendant North Idaho College's Memorandum in Reply to Plaintiff's Opposition to Defendant's Motion for Summary Judgment	Lansing L. Haynes
9/8/2010	DCHH	SVERDSTEN	Hearing result for Motion for Summary Judgment held on 09/08/2010 03:30 PM: District Court Hearing Held TAKEN UNDER ADVISEMENT Court Reporter: LAURIE JOHNSON Number of Transcript Pages for this hearing estimated: Castleton	Lansing L. Haynes
9/10/2010	HRSC	SVERDSTEN	Hearing Scheduled (Status Conference 11/01/2010 03:30 PM)	Lansing L. Haynes
		SVERDSTEN	Notice of Hearing	Lansing L. Haynes
9/20/2010	ANSW	CLEVELAND	Answer - Response to Status Conference Notice	Lansing L. Haynes
9/27/2010	RSCN	SREED	Response to Status Conference Notice-Castleton	Lansing L. Haynes
10/15/2010	MEMO	SVERDSTEN	Memorandum Decision and Order Re: Defendant North Idaho College's Motion for Summary Judgment	Lansing L. Haynes
10/27/2010	MOTN	BAXLEY	Defendant North Idaho College's Motion For Reconsideration	Lansing L. Haynes
11/1/2010	HRSC	SVERDSTEN	Hearing Scheduled (Motion to Reconsider 12/17/2010 09:00 AM) Bruce Castleton	Lansing L. Haynes
	DCHH	SVERDSTEN	Hearing result for Status Conference held on 11/01/2010 03:30 PM: District Court Hearing Hel Court Reporter: LAURIE JOHNSON Number of Transcript Pages for this hearing estimated:	Lansing L. Haynes
11/4/2010	HRSC	SVERDSTEN	Hearing Scheduled (Jury Trial Scheduled 06/20/2011 09:00 AM) 4 DAYS	Lansing L. Haynes
		SVERDSTEN	Notice of Trial	Lansing L. Haynes
11/9/2010	ANHR	ROSENBUSCH	Amended Notice Of Hearing Re: Defendant North Idaho College's Motion for Reconsideration	Lansing L. Haynes

Victoria Johnson vs. North Idaho College, Donald W Friis

Date	Code	User		Judge
12/8/2010	ANHR	BAXLEY	SECOND Amended Notice Of Hearing RE Defendant North Idaho College's Motion For Reconsideration on 12/17/10 at 9:00 am	Lansing L. Haynes
12/10/2010	OBJT	CRUMPACKER	Plaintiffs Objection to Defendant North Idaho College's Motion for Reconsideration	Lansing L. Haynes
12/15/2010	MISC	CRUMPACKER	Defendant North Idaho College's Reply to Plaintiff's Objection to Defendant NIC's Motion for Reconsideration	Lansing L. Haynes
12/17/2010	DCHH	SVERDSTEN	Hearing result for Motion to Reconsider held on 12/17/2010 09:00 AM: TAKEN UNDER ADVISEMENT District Court Hearing Held Court Reporter: LAURIE JOHNSON Number of Transcript Pages for this hearing estimated: Bruce Castleton - APPEARING TELEPHONICALLY 208-947-2069 DIRECT LINE (office 208-343-9511)	Lansing L. Haynes
12/22/2010	PLWL	CRUMPACKER	Plaintiff's Expert Witness Disclosure	Lansing L. Haynes
1/3/2011	HRSC	SVERDSTEN	Hearing Scheduled (Decision 01/11/2011 01:30 PM) Attorneys will be appearing telephonically. Mr. Castleton will set up the conference call. 208-947-2069	Lansing L. Haynes
		SVERDSTEN	Notice of Hearing	Lansing L. Haynes
	LETR	LEU	Letter From Bruce J. Castleton	Lansing L. Haynes
1/11/2011	DCHH	SVERDSTEN	Hearing result for Decision held on 01/11/2011 01:30 PM: District Court Hearing Held Court Reporter: VAL NUNEMACHER Number of Transcript Pages for this hearing estimated: Attorneys will be appearing telephonically. Mr. Castleton has set up the conference call. dial 888-204-5987 and enter code 1970256	Lansing L. Haynes
	HRVC	SVERDSTEN	Hearing result for Jury Trial Scheduled held on 06/20/2011 09:00 AM: Hearing Vacated 4 DAYS	Lansing L. Haynes
1/12/2011	FILE	POOLE	New File Created # 3 Expando-Judges Notes	Lansing L. Haynes
1/21/2011	ORDR	LEU	Order	Lansing L. Haynes
	CVDI	LEU	Civil Disposition entered for: Friis, Donald W, Defendant; North Idaho College, Defendant; Johnson, Victoria, Plaintiff. Filing date: 1/21/2011	Lansing L. Haynes
	FJDE	LEU	Final Judgement, Order Or Decree Entered	Lansing L. Haynes
	STAT	LEU	Case status changed: Closed	Lansing L. Haynes
3/4/2011		CLEVELAND	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: McMillan, James (attorney for Johnson, Victoria) Receipt number: 0009248 Dated: 3/4/2011 Amount: $101.00 (Check) For: Johnson, Victoria (plaintiff)	Lansing L. Haynes
	NOTC	BIELEC	Notice Of Appeal	Lansing L. Haynes

First Judicial District Court - Kootenai County

ROA Report

Case: CV-2006-0007150 Current Judge: Lansing L. Haynes

Victoria Johnson vs. North Idaho College, etal.

Victoria Johnson vs. North Idaho College, Donald W Friis

Date	Code	User		Judge
3/4/2011	APDC	BIELEC	Appeal Filed In District Court	Lansing L. Haynes
	STAT	BIELEC	Case status changed: Reopened	Lansing L. Haynes
3/7/2011	BNDC	LEU	Bond Posted - Cash (Receipt 9454 Dated 3/7/2011 for 100.00)	Lansing L. Haynes
3/8/2011	BNDC	LEU	Bond Posted - Cash (Receipt 9938 Dated 3/8/2011 for 200.00)	Lansing L. Haynes
3/17/2011	NAPL	SREED	Notice Of Appeal Due Date From Supreme Court	Lansing L. Haynes

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STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:
2010 AUG 25 PM 2:43
CLERK DISTRICT COURT
DEPUTY

JAMES McMILLAN,
ATTORNEY AT LAW
415 Seventh Street, Suite 7
Wallace, Idaho 83873
Telephone: (208) 752-1800
Facsimile: (208) 752-1900
ISB # 7523
Attorney for Plaintiff.

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

VICTORIA JOHNSON, Plaintiff, vs. NORTH IDAHO COLLEGE, an Idaho Corporation, and DONALD FRIIS, an individual Defendants.	Case No. CV-06-7150 **AFFIDAVIT OF JAMES McMILLAN IN OPPOSITION TO DEFENDANT NORTH IDAHO COLLEGE'S MOTION FOR SUMMARY JUDGMENT**

STATE OF IDAHO)
) ss.
County of Shoshone)

I, JAMES McMILLAN, being first duly sworn upon oath, deposes and says:

1. I am over the age of eighteen and am competent to testify to the matters set forth herein;

2. I am the attorney of record for the Plaintiff in this matter and have personal

knowledge of the facts to which I am testifying.

3. Attached hereto as Exhibit A is a true and correct copy of Plaintiff's State of Material Facts Which Are In Dispute, filed in United States District Court Case No. CIV-06-436-EJL as Docket No. 64;.

4. Attached hereto as Exhibit B is a true and correct copy of the Affidavit of Michelle Cook In Opposition to Defendants' Motions for Summary Judgment, filed in United States District Court Case No. CIV-06-436-EJL as Docket No. 67;

5. Attached hereto as Exhibit C is a true and correct copy of the Affidavit of Victoria Johnson In Opposition to Defendants' Motions for Summary Judgment, filed in United States District Court Case No. CIV-06-436-EJL as Docket No. 66; and

6. Attached hereto as Exhibit D is a true and correct copy of the Affidavit of Rami Amaro In Opposition to Defendants' Motions for Summary Judgment, filed in United States District Court Case No. CIV-06-436-EJL as Docket No. 65.

Further your affiant sayeth naught.

JAMES McMILLAN

SUBSCRIBED and sworn to before me on the 25th day of August, 2010.

SHANNON McMILLAN NOTARY PUBLIC STATE OF IDAHO

NOTARY PUBLIC for the State of Idaho
Residing in Silverton
My Commission Expires 12/31/2013

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of August, 2010, I caused to be served a true and correct copy of the foregoing to the following, by the method indicated below:

Kirtlan G. Naylor/Bruce J. Castleton
Naylor & Hales, P.C.
950 W. Bannock, Ste. 610
Boise, ID 83702
Attorneys for Defendant NIC

___ U.S. Mail
___ Overnight Mail
___ Hand Delivered
X Facsimile to: (208) 383-9516

Peter C. Erbland
Paine Hamblen, L.L.P.
701 Front Ave.
P.O. Box E
Coeur d'Alene, ID 83816
Attorney for Defendant Friis

___ U.S. Mail
___ Overnight Mail
___ Hand Delivered
X Facsimile to: (208) 664-6338

James McMillan

RAMI AMARO, ISB #5848
JAMES MCMILLAN, ISB #7523
AMARO LAW OFFICE
1875 North Lakewood Dr., Ste. 102
Coeur d'Alene, ID 83814
Telephone: (208) 665-7551
Facsimile: (208) 667-9992
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

VICTORIA JOHNSON,

Plaintiff,

vs.

NORTH IDAHO COLLEGE, an Idaho Corporation, and DONALD FRIIS, an individual

Defendants.

Case No. CIV06-436-EJL

PLAINTIFF'S STATEMENT OF MATERIAL FACTS WHICH ARE IN DISPUTE IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

COMES NOW the Plaintiff, VICTORIA JOHNSON, by and through her Counsel of Record RAMI AMARO of the AMARO LAW OFFICE, and hereby respectfully submits her Statement of Material Facts Which Are In Dispute, pursuant to Local Civil Rule 7.1(c)(2) as follows:

1. The harassment of Plaintiff by Defendant Friis, then employed by Defendant NIC, first began in 2001, when Ms. Johnson enrolled in an introductory computer class at NIC taught by Friis, at the suggestion of her academic advisor. During this time, Friis almost immediately began to act inappropriately toward Ms. Johnson. Mr. Friis' actions included flirtatious behavior, constantly asking Ms. Johnson to date him, in addition to yelling, humiliation, and other degrading treatment.

Throughout, Friis, indicated that her grade could be affected by her response to his actions. This behavior continued, until she was forced to withdraw from the course prior to the conclusion of the semester.

2. Ms. Johnson continued at NIC, and was again informed, in 2004, that she should take the introductory computer course. When she inquired as to who would be teaching the course, she was informed that it would be Donald Friis. She then asked whether she would be able to take the course from another instructor, to which she was informed that the only section available was that taught by Friis. Reluctantly, she enrolled in the course, with the hope that, on this occasion, Friis' behavior would have improved.

3. However, Defendant Friis' behavior did *not* improve, and, in fact, began to escalate. In addition to the same harassment she experienced in 2001, Friis began to call her at home, and leave repeated messages upon her answering machine. The messages were left both during the business day, as well as in the evenings and on the weekends. Although Friis did occasionally mention school related issues in said messages, the majority of said messages had nothing to do with school. A copy of said messages is in the possession of all parties, and will be used as evidence at trial, and is submitted in part as an Exhibit to the Affidavit of Victoria Johnson, filed contemporaneously herewith.

4. Due to Friis' harassment, Ms. Johnson was afraid to approach him regarding her course-work, as well as other aspects of the subject-matter of the class, and the emotional distress she suffered as a result this treatment caused her to suffer academically in all aspects. Eventually, she was again unable to complete the course, and received an "incomplete." Due to the fact that Friis made it all but impossible for Ms. Johnson to continue to work with him, the incomplete was converted to an "F," resulting in her failure of the course.

5. Ms. Johnson's fear of running into Friis prohibited her from attending other classes, and

from obtaining assistance in other classes, forcing her to receive low grades and incompletes in classes other than Friis'. This resulted in Ms. Johnson's financial aid being withdrawn and her forced leave from college for greater than a semester. Obviously, this delayed her education and graduation, as well as her entry into her Bachelor's and Master's program.

6. Ms. Johnson discussed her discomfort with Friis with several teachers, but did not make a formal complaint for some time. Ultimately, Ms. Johnson made a formal complaint with NIC for sexual harassment, despite the fact that her earlier accounts to the above described staff members resulted in no action being taken. After the Sexual Harassment committee concluded its investigation, it determined that Friis had, in fact, committed sexual harassment, and Friis was forced to resign from his position at NIC.

7. Prior to Ms. Johnson's complaint, a male student had made a complaint with NIC regarding Friis invading his personal space. As a result of that complaint Friis was sent to training to learn how to respect personal boundaries with students. NIC, however, despite its knowledge of Friis' propensity to engage in inappropriate behavior with students, did not supervise or monitor Friis thereafter to ensure that his behavior with students had improved.

8. After the male student had complained and Friis had been sent to training, and during the time in which he was harassing Ms. Johnson, he continued to behave in inappropriate manner with students, and this was behavior was noted by other students as well as other teachers.

DATED this 26 day of November, 2007.

AMARO LAW OFFICE.

By: _____
RAMI AMARO.
Attorney for Plaintiff

PLAINTIFF'S STATEMENT OF MATERIAL FACTS 4

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26 day of November, 2007, I caused to be served a true and correct copy of the foregoing to the following, by the method indicated below:

Bruce J. Castleton, Attorney for Defendant North Idaho College
bjc@givenspursley.com

✓ CM/ECF System
___ U.S. Mail
___ Via Facsimile

Peter C. Erbland, Attorney for Defendant Donald Friis
peter.erbland@paineshamblen.com

✓ CM/ECF System
___ U.S. Mail
___ Via Facsimile

By: [signature]

RAMI AMARO, ISB #5848
JAMES MCMILLAN, ISB #7523
AMARO LAW OFFICE
1875 North Lakewood Dr., Ste. 102
Coeur d'Alene, ID 83814
Telephone: (208) 665-7551
Facsimile: (208) 667-9992
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

VICTORIA JOHNSON, Plaintiff, vs. NORTH IDAHO COLLEGE, an Idaho Corporation, and DONALD FRIIS, an individual Defendants.	Case No. CIV06-436-EJL **AFFIDAVIT OF MICHELLE COOK IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT**

STATE OF IDAHO)
) ss.
County of Kootenai)

MICHELLE COOK, being first duly sworn upon oath, deposes and says:

1. I am over the age of eighteen (18) years, and I am competent to testify to the facts herein.

2. I was also in Defendant Friis' class with the Plaintiff in the above-captioned matter and thus have personal knowledge of the facts to which I am testifying. Said class occurred in Fall of 2001.

Exhibit B

3. During said class I observed Defendant Friis touch Plaintiff on multiple occasions, ask her out on dates, and ask personal questions of the Plaintiff.

4. During said class Defendant Friis also acted in a flirtatious manner toward me.

5. On one occasion, Defendant Friis asked the Plaintiff and I to go to breakfast with him. I felt that, as he was our professor, if we turned him down, it would have a negative impact upon our grades.

6. During said class I never saw anyone from NIC present to monitor, observe or supervise Friis.

DATED this 26th day of November, 2007.

Michelle Cook
MICHELLE COOK

SUBSCRIBED and SWORN to before me on this 26th day of November, 2007.

Notary Public for the State of Idaho
Residing at Coeur d'Alene, I.D.
My Commission Expires: 11-04-09

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26 day of November, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Bruce J. Castleton, Attorney for Defendant North Idaho College
bjc@racinelaw.com

X CM/ECF System
U.S. Mail
Via Facsimile

Peter C. Erbland, Attorney for Defendant Donald Friis
peter.erbland@quinnchamblen.com

X CM/ECF System
U.S. Mail
Via Facsimile

By: _____

AFFIDAVIT OF MICHELLE COOK - 3

RAMI AMARO, ISB #5848
JAMES MCMILLAN, ISB #7523
AMARO LAW OFFICE
1875 North Lakewood Dr., Ste. 102
Coeur d'Alene, ID 83814
Telephone: (208) 665-7551
Facsimile: (208) 667-9992
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

VICTORIA JOHNSON, Plaintiff, vs. NORTH IDAHO COLLEGE, an Idaho Corporation, and DONALD FRIS, an individual Defendants.	Case No. CIV06-436-EJL AFFIDAVIT OF VICTORIA JOHNSON IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

STATE OF IDAHO)
) ss.
County of Kootenai)

VICTORIA JOHNSON, being first duly sworn upon oath, deposes and says:

1. I am over the age of eighteen (18) years, and I am competent to testify to the facts herein.

2. I am the Plaintiff in the above-captioned matter and thus have personal knowledge of the facts to which I am testifying.

3. In addition to the harassment I suffered at the hands of Defendant Fris on

campus. Friis would frequently contact me during times that I was not taking a class from him; and would contact me after hours and on weekends during times that I was taking a class with him. For example, he would frequently call me as late as after 9:00 PM on weekdays and on weekends. Additionally, Friis telephoned me ten to twenty times during the summer of 2004, during which time I was *not* taking any classes from said Defendant. The messages that Friis would leave on my answering machine were very personal, and more frequently than not had nothing to do with school – but rather with his attempts to enter into a relationship with me.

4. Attached hereto as Exhibit A is a true and correct copy of a transcription of just some of the messages left upon my answering machine by Defendant Friis, the entire recordings of which are in the possession of all parties' counsel, and which have previously been transcribed in full by Defendant NIC. See attachment to Defendant NIC's Motion for Summary Judgment in the form of the Affidavit of Bruce Castleton, on page 49.

5. During the time that I took the courses with Defendant Friis I never saw anyone from NIC come in to the class to observe, monitor or supervise Friis.

6. The harassment of me by Defendant Friis, then employed by Defendant NIC, first began in 2001, when I enrolled in an introductory computer class at NIC taught by Friis, at the suggestion of my academic advisor. During this time, Friis almost immediately began to act inappropriately toward me. Mr. Friis' actions included flirtatious behavior, constantly asking me to date him, in addition to yelling, humiliation, and other degrading treatment. Throughout, Friis indicated that my grade could be affected by my response to his actions. This behavior continued, until I was forced to withdraw from the course prior to the conclusion of the semester.

7. I continued at NIC, and was again informed, in 2004, that I should take the introductory computer course. When I inquired as to who would be teaching the course, I was

informed that it would be Donald Friis. I then asked whether I would be able to take the course from another instructor, to which I was informed that the only section available was that taught by Friis. Reluctantly, I enrolled in the course, with the hope that, on this occasion, Friis' behavior would have improved.

8. However, Defendant Friis' behavior did *not* improve, and, in fact, began to escalate. In addition to the same harassment I experienced in 2001, Friis began to call me at home, and leave repeated messages upon my answering machine. The messages were left both during the business day, as well as in the evenings and on the weekends. Although Friis did occasionally mention school related issues in said messages, the majority of said messages had nothing to do with school. The tape recording of said messages is in the possession of all parties, and will be used as evidence at trial, and is submitted in part as an Exhibit A to this Affidavit. These messages were left in the summer of 2004 after I had taken Friis' class again in spring of 2004.

9. Due to Friis' harassment, I was afraid to approach him regarding my course-work, as well as other aspects of the subject-matter of the class, and the emotional distress I suffered as a result this treatment caused me to suffer academically in all aspects. Eventually, I was again unable to complete the course, and received an "incomplete." Due to the fact that Friis made it all but impossible for me to continue to work with him, the incomplete was converted to an "F," resulting in my failure of the course.

10. My fear of running into Friis prohibited me from attending other classes, and from obtaining assistance in other classes, forcing me to receive low grades and incompletes in classes other than Friis'. This resulted in my financial aid being withdrawn and my forced leave from college for greater than a semester. Obviously, this delayed my education and graduation, as

well as my entry into my Bachelor's and Master's program.

11. I discussed my discomfort with Friis with several teachers, but did not make a formal complaint for some time. Ultimately, I made a formal complaint with NIC for sexual harassment, despite the fact that my earlier accounts to the above described staff members resulted in no action being taken. After the Sexual Harassment committee concluded its investigation, it determined that Friis had, in fact, committed sexual harassment, and Friis was forced to resign from his position at NIC.

12. Many months prior to my complaint, a male student had made a complaint with NIC regarding Friis invading his personal space. As a result of that complaint Friis was sent to training to learn how to respect personal boundaries with students. NIC, however, despite its knowledge of Friis' propensity to engage in inappropriate behavior with students, did not supervise or monitor Friis thereafter to ensure that his behavior with students had improved.

13. After the male student had complained and Friis had been sent to training, he continued to behave in inappropriate manner with me, and this was behavior was noted by other students as well as other teachers.

DAMI AMARO NOTARY PUBLIC STATE OF IDAHO

DATED this 21 day of November, 2007.

VICTORIA JOHNSON

SUBSCRIBED and SWORN to before me on this 21 day of November, 2007.

Notary Public for the State of Idaho
Residing at [illegible]
My Commission Expires: 11/22/13

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21 day of November, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Bruce J. Castleton, Attorney for Defendant North Idaho College
bjc@[redacted]taylorhales.com

X CM/ECF System
___ U.S. Mail
X Via Facsimile

Peter C. Erbland, Attorney for Defendant Donald Friis
pcf.erbland@[redacted]-pmchamblep.com

X CM/ECF System
___ U.S. Mail
X Via Facsimile

BY: [redacted]

EXHIBIT A

1. Monday 9:10 PM: Good evening Victoria this is Don Friis. I'm walking around on my property not sure if you can hear me or not. I've been thinking about you all week. I'm hoping that you day turns out as what you want and that your not uh sad and that's really important. I know how you feel and uh I wish there was something I can do about it. I just wanted to tell you that I'll stand up for you. Uh been thinking about you a lot this week. Uh I hope to hear from you this next week. I would like to uh get together uh maybe there's a possibility there. Anyway. I just wanted to let you know that uh that my thoughts and prayers are with you and uh I hope to hear from you and I hope that you have good news about your job and that you're comfortable with it and its uh something you want to do. Again this is Don Friis. I hope to hear from you and uh. please have a good weekend.
2. Monday 8:50 PM: Hey Victoria. How are you today? This is Don Friis … *unintelligible* . . I hope you're doing well, I'm sure looking forward to seeing you and talking with you in person again. Uh I just want to touch base with you. I hope all is fine and that you're relaxing and uh gimme a call if you need anything or if you need help uh gimme a call. Love to see you and uh looking forward to having a relationship with you. You take care of yourself. Okay. This is Don Friis.
3. Wednesday 10:59 AM: Hello Victoria this is Don. I hope you get this message. yesterday I brought for tickets for Kats It's this Friday. I would love to take you to the play Kats this Friday and also take you to dinner. This is Wednesday now so please please call me to confirm if you would like to go to dinner and if you would like Kats. I hope you would uh consider it. I think it would be great. I think we both need it and I think it would be fun. So anyway uh I hope that you consider it and uh I hope to hear from you. That'll be. uh lets see. Friday August 20th. It starts at 7:30. I'd really appreciate it if you could get back with me. I got two tickets on Tuesday and I'd love to take you. also to dinner. Uh give me a call. You have a great evening.
4. Wednesday 7:45 PM: Hey Victoria this is Don. I'm trying to call you on the 6514478 and I keep getting a sound that says it's busy. Anyway. I just wanted to let you know I have two tickets for this Friday for Kats. I would love to be with you and take you to it and also take you to dinner. So would you please give me call and let me know that you received this message and that you can go. I hope you can. I'll be looking forward to hearing from you. I guess that's it. Have a good day Bye.

RAMI AMARO, ISB #5848
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AMARO LAW OFFICE
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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

VICTORIA JOHNSON, Plaintiff, vs. NORTH IDAHO COLLEGE, an Idaho Corporation, and DONALD FRIIS, an individual Defendants.	Case No. CIV06-436-EJL AFFIDAVIT OF RAMI AMARO IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

STATE OF IDAHO)
) ss.
County of Kootenai)

RAMI AMARO, being first duly sworn upon oath, deposes and says:

1. I am over the age of eighteen (18) years, and I am competent to testify to the facts herein.

2. I am counsel of record for the Plaintiff in the above-captioned matter and thus have personal knowledge of the facts to which I am testifying.

3. Attached hereto as Exhibit A is a true and correct copy of Page 5 of the NIC

Exhibit D

67

Sexual Harassment Committee Report, discussing the previous incident with the male student. Said incident occurred January 2004. See also, NIC Sexual Harassment Committee Report, attached to the Affidavit of Bruce Castleton, filed herein as an attachment to Defendant NIC's Motion for Summary Judgment, filed herein as Docket Number 49.

d. Attached hereto as exhibit B are true and correct copies of statements made by two different NIC professors, both of whom observed Friis engaging in inappropriate behavior with students AFTER attending the sensitivity training required after the student made the complaint in early spring of 2004. Said statements were provided by NIC in response to discovery requests propounded by Plaintiff Johnson, and were obtained by NIC in the course of their internal investigation of the harassment of Plaintiff Johnson by Defendant Friis. Said statements constitute admissions by a party opponent; recorded recollections; business records; as well as falling under FRE 807.

DATED this 26 day of November, 2007.

RAMI AMARO

SUBSCRIBED and SWORN to before me on this 26 day of November, 2007.

JAMES McMILLAN NOTARY PUBLIC STATE OF IDAHO

Notary Public for the State of Idaho
Residing at Wallace
My Commission Expires: 3/31/2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26 day of November, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Bruce J. Castleton, Attorney for Defendant North Idaho College
bjc@gaylordsales.com

___ CM/ECF System
___ U.S. Mail
Y Via Facsimile

Peter C. Erbland, Attorney for Defendant Donald Friis
peter.erbland@painehamblen.com

Y CM/ECF System
___ U.S. Mail
___ Via Facsimile

By: [redacted]

EXHIBIT A

Summary of Findings

- Don attempted a dating/ personal relationship with a student while he still had control over her grade. The final determination of the grade would not be made until the end of the sixth week during the fall semester of 2004.
- Don pleaded ignorance with respect to thinking his actions were inappropriate.
  - "I didn't put in my mind that she was a student"
  - "It was poor judgment on my part"
- Don's syllabus, in two separate areas, addresses NIC policy and Federal Law in regards to sexual harassment.
- Don counseled Sharon Olson (student teacher in Ed. 201 Field Experience) as to the importance of keeping a professional relationship toward students. Sharon told this to our group.
- In Don's response to the complaint, he states, "I have never been reported for any form of harassment anytime during my tenure as an instructor".
  - However, it was discovered that an informal complaint had been made to HR on Jan. 21, 2004, when a young man made a complaint regarding how close Don got to him. The young man expressed concern and discomfort about how close Don "gets to him in class".
  - Don was required to go to counseling/ sensitivity training on "boundaries of touch" with an area counselor.
  - Don was required to go to counseling/ sensitivity training on "boundaries of touch" with an area counselor.
  - Don attended the required NIC sexual harassment workshop on 1-6-04 and the mandated sensitivity training in February, 2004. Despite the training, the incidents with Victoria continued to occur within the same semester of the trainings.
  - While Don showed the ability to understand and communicate the concepts with the Ed. 201 student, his behavior with Victoria was inconsistent with his knowledge base.
- As long as the grade "is in play", Don was in a position of power with the student. In the tape of the telephone calls to Victoria, Don mixed classroom "computer work" (call #6 on Sunday, 8:30 p.m.) and the desire to date/ have a relationship with her.

NIC 50

EXHIBIT B

interoffice memo

Date: 4/27/2005

To: Brenda Smith, Human Resources Director

Cc: Judy Parker, Business & Professional Programs Chair

From: Kay Nelson

RE: Don Friis

In response to Judy Parker's request this afternoon, this memo is to relate the observed actions of Don Friis on April 26, 2005.

On April 26 (late morning), Gayne Clifford and I were conversing outside our offices and were slowly walking by Don's office on our way to class. His door was open and I could see that a female student was sitting at Don's office chair in front of his computer. Don was sitting close to her left in another chair. The student had a folder or book (I didn't pay very close attention to this) on her lap. Don was talking to her – and I saw him touch her shoulder and then in another sentence or two, he reached over and laid his hand on top of the book/folder. I could not clearly hear their conversation – and I assumed Don was probably tutoring or counseling her.

Gayne and I proceeded down the hall and when we reached the top of the stairs I stopped Gayne and remarked "Gayne, did you see Don touch that student? That was a stupid thing to do. He is leaving himself wide open for a future problem!" I related to Gayne that in times past I had seen Don touch students on the shoulder or arm while in the Molstead PC Lab. I can also recall that on one occasion, I told Don that he should not touch students, even on the arm or shoulder.

Personally, I doubt that Don was trying to initiate an intimate relationship with this student or other students. I think he tries to be on a very friendly and warm basis with all students, wants to be their friend, and doesn't understand that he can't touch, use words, or display body language that may imply a different kind of relationship.

Personal and Confidential

MEMORANDUM

TO: Brenda Smith, Director of Human Resources

FROM: Gayne Clifford, Department of Business and Professional Programs

SUBJECT: Observation of Mr. Friis

DATE: April 27, 2005

In response to our telephone conversation this morning, the following is a brief summary of what Mr. Kay Nelson and I witnessed in Don Friis' office on Tuesday, April 26, 2005.

Kay and I had been talking about course materials in his office and had moved out into the hallway as we were wrapping up the conversation. Kay's office is adjacent to Don's. Don was in his office with a female student. The student was wearing a short-sleeve blouse and shorts. Don was apparently giving the student some assistance on the computer as she was sitting in his office chair facing the computer and Don was sitting next to and facing her in the extra chair in his office as she worked at the keyboard.

Kay and I were just outside Don's office door at this point and observed Don as he reached over and touched what I thought was the girl's leg. Don then said something to the girl that I could not distinguish and then reached out again and touched her upper arm. At this point Kay and I moved down the hallway. Kay stopped at the top of the stairs as we were walking and commented in a very surprising manner that he couldn't believe Don actually reached out and touched the young lady two times.

As I related this observation to Judy Parker last night, I was under the impression that Don had touched her leg. In discussing this with Kay this morning, he had a better angle of the office than I did and his impression was that Don had touched the papers the student had on her lap. We were both in agreement however that Don had touched the girl's bare arm.

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED: #709 de 6

2010 AUG 25 PM 2:41

CLERK DISTRICT COURT
DEPUTY

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ISB # 7523
Attorney for Plaintiff.

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

VICTORIA JOHNSON, Plaintiff, vs. NORTH IDAHO COLLEGE, an Idaho Corporation, and DONALD FRIIS, an individual Defendants.	Case No. CV-06-7150 **PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT NORTH IDAHO COLLEGE'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW the Plaintiff, VICTORIA JOHNSON, by and through her Counsel of Record JAMES McMILLAN, Attorney at Law, and hereby respectfully submits her Memorandum in Opposition to Defendants' Motions for Summary Judgment as follows:

I. INTRODUCTION

The facts as set forth in Plaintiff's Statement of Material Facts, filed on or about November 26, 2007 as Docket No. 64 in the United States District Court, and submitted contemporaneously herewith (*see* Affidavit of James McMillan, Exhibit A), are hereby expressly

incorporated by reference as though fully set forth herein. The procedural history of this case is set forth as follows:

On or about September 26, 2006, Plaintiff filed the instant action in this Court setting forth claims of sexual harassment in violation of State and Federal statutes, in addition to several related common-law tort claims. On October 31, 2006, Defendant North Idaho College (hereinafter "NIC") sought removal to this Court, on the grounds that the Federal civil rights claims constituted a "Federal question" pursuant to 28 U.S.C. § 1331, to which all parties consented. *See* Notice of Removal, on file in Idaho Federal District Court Case No. CIV-06-436-EJL (hereinafter "Federal Proceeding") at Docket No. 1.

Following removal, Defendants filed motions pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), claiming that the Idaho Human Rights complaint was untimely with regard to its ability to serve as a Notice of Tort Claim as to the common law tort claims, and that the Complaint incorrectly pled a cause of action pursuant to Title VII of the Federal Civil Rights Act (employment discrimination), rather than Title IX (education discrimination). *See* Defendant NIC's FRCP 12(b)(1) Motion to Dismiss *and* Defendant NIC's FRCP 12(b)(6) Motion to Dismiss, on file in the Federal Proceeding at Docket Nos. 6 and 5. Plaintiffs sought to amend the Complaint in order to correct the statutory citation, and make the necessary allegations in order to state a claim pursuant to Title IX, *see* Motion to Amend, on file in the Federal Proceeding at Docket No. 12, to which Defendants did not object. Defendant NIC;s Non-Opposition to Motion to Amend, on file in the Federal Proceeding at Docket No. 19. The Amended Complaint rendered Defendants' 12(b)(6) Motion to Dismiss as moot, while this Court ultimately granted Defendants' 12(b)(1) Motion to Dismiss with regard to the state common law

tort claims. *See* Memorandum Order, on file in the Federal Proceeding at Docket No. 27.

On or about October 31, 2007, Defendants moved for summary judgment, which was granted. Plaintiff subsequently appealed the judgment of the District Court to the Ninth Circuit, *see* Notice of Appeal, on file in the Federal Proceeding at Docket No.92, resulting in the reversal of the judgment of the District Court on the issue of respondeat superior pursuant to the Idaho Human Rights Act. Federal Proceeding, Docket No. 101.

Therefore, the issue remaining before this Court is Defendant N.I.C.'s vicarious liability pursuant to the Idaho Human Rights, Idaho Code § 67-5901, *et seq.*, and it was upon this remaining issue that Defendant NIC renewed its Motion for Summary Judgment Since genuine issues exist as to the material facts relating to Defendant NIC's deliberate indifference to Defendant Friis' sexual harassment of the Plaintiff pursuant the Idaho Human Rights Act, Defendant NIC is not "entitled to a judgment as a matter of law," and Defendant's Renewed Motion for Summary Judgment should be DENIED.

II. ARGUMENT

1. Standard for Summary Judgment.

In ruling upon a Motion for Summary Judgment, the Court must consider whether or not "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is . . . [a] genuine issues as to any material fact," and whether the Defendants are "entitled to a judgment as a matter of law." Idaho R. Civ. P. 56(c). Further, "[s]tandards applicable to summary judgment require the district court . . . to *liberally* construe facts in the existing record *in favor of the nonmoving party*, and to *draw all reasonable inferences* from the record in favor of the *nonmoving party*." *Bonz v. Sudweeks*, 119 Idaho 539, 541, 808 P.2d 876, 878 (1991)

(emphasis added).

Moreover, in hearing a Motion for Summary Judgment, "it is *not* the judge's function to weigh the evidence, but to determine *whether there is a genuine issue for trial.* There is [an] issue for trial [if] there is sufficient evidence favoring the non-moving party *for a jury to return a verdict for that party*." *Nelson v. Steer*, 118 Idaho 409, 410, 797 P.2d 117, 118 (1990) (emphasis added, internal quotations and citations removed). The First Circuit, construing the Federal rule upon which the Idaho rule is modeled, further explained the term "genuine" as being "sufficiently open-ended to permit a *rational factfinder to resolve the issue in favor either side.*" *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1995). In the same case, it further defined "material" as "a fact that has the capacity to sway the outcome of the litigation under the applicable law." *Id.* To put it another way, as the summary judgment standard is often explained by law professors, summary judgment is appropriate only if "reasonable minds cannot differ" as to the position offered by the moving party, based upon the evidence available in the record.

Since, based upon the evidence currently in the record, a rational trier of fact could reasonably find: (1) that Friis was acting in a supervisory capacity over Plaintiff; (2) that a portion of the acts alleged took place within the scope and course of Friis' employment; (3) that adverse educational action was taken against Plaintiff; (4) that Defendant NIC did not exercise reasonable care in preventing and correcting the sexually harassing behavior; and (5) that Plaintiff did not unreasonably fail to take advantage of preventive or corrective opportunities Defendants NIC is *not* entitled to a "judgment as a matter of law." Therefore, Defendant's Renewed Motion for Summary Judgment should be DENIED.

2. The Ninth Circuit Decision is Binding Upon this Court As Law of the Case.

Initially, despite the Ninth Circuit's ruling, Defendant NIC again attempts to argue that (despite the *clear* language of Idaho Code §§ 67-5902(10) and 67-5909(7)) that this action is governed by the higher standard set forth under Title IX, rather than Title VII. While it is true that the Ninth Circuit's opinion would not be binding upon this court with regard to a *separate* proceeding, i.e., if it were cited in support of a newly-filed discrimination suit, in this case it was raised on *direct* appeal from a decision of a court which *validly* exercised its supplemental jurisdiction over said claim, and, as such, the Ninth Circuit's decision *is* binding upon this Court in *this case*, pursuant to the law of the case doctrine. *Swanson v. Swanson*, 134 Idaho 512, 515, 5 P.3d 973, 976 (2000); *Hall v. Blackman*, 9 Idaho 555, 75 P. 608, 609 (1904) (holding that the law of the case applies where the "question was directly raised upon [the first] appeal, and was squarely before the court, and its determination was essential to a determination of that appeal.").[1]

Even if the Ninth Circuit decision is *not* binding upon this Court, Plaintiff urges this Court to adopt the reasoning as set forth in the Ninth Circuit's decision, since, as set forth therein, it is *clear* that the definition of an "educational institution" includes *agents* of an educational institution, Idaho Code §67-5902(10), and that, *unlike* the federal statutory scheme, the Idaho Human Rights Act treats education discrimination *identically*. Idaho Code § 67-5909. As such, this matter should proceed, pursuant to Plaintiff's Idaho Human Rights Act claim.

3. That Some of Defendant Friis' Conduct Took Place Within the Scope and Course of his Employment is now the Law of the Case.

1 Plaintiff would also note that, if the Federal decisions regarding the State law claims are not binding upon this Court, then the Federal District Court's dismissal of the *State Law Tort Claims* would *likewise* not be binding upon this Court.

The main basis of Defendant NIC's Renewed Motion for Summary Judgment is that "all material alleged actions of Donald Friis were outside the scope and course of his employment," Memorandum in Support of Motion for Summary Judgment at 11–14, on file herein, thus rendering them not liable pursuant to the Respondeat Superior doctrine. *Id.* However, on or about November 10, 2006, Defendant NIC filed a Motion to Dismiss Plaintiff's tort claims (in which Defendant Friis joined), on the basis of the Idaho Tort Claims Act. Federal Proceeding, Docket No. 6. In Defendant NIC's Memorandum in Support thereof, it states that the Idaho Tort Claims Act applies to those acts which took place with the *scope and course* of the tortfeasor-employee's employment. Memorandum in Support of Motion to Dismiss at 2 (Federal Proceeding, Docket No. 6-2). The United States District Court agreed with the Defendants on that regard, over Plaintiff's opposition, and proceeded to dismiss Plaintiff's common law tort claims (hereinafter "Tort Claims"). Memorandum Order, Federal Proceeding, Docket No. 27. This Order was affirmed by the Ninth Circuit on appeal. (Federal Proceeding, Docket No. 101).

Given that the United States District Court dismissed Plaintiff's Tort Claims pursuant to the Idaho Tort Claims Act, and given that the Idaho Tort Claims act only applies to those acts which occur within the scope and course of the offending employee's employment, Idaho Code § 6-903, it follows, then, that the Federal District Court's dismissal of said claims necessarily included an implicit finding that said acts alleged, if true, took place within the scope and course of Defendant Friis' employment. As such, the Ninth Circuit's decision affirming said dismissal renders this implicit finding as the law of the case; therefore, this Court may not now enter a ruling to the contrary. *United States v. Park Place Assoc., Ltd.*, 563 F.3d 907, 925 (2009) ("For a prior ruling to become law of the case as to a particular issue, that issue must have been decided

explicitly *or by necessary implication* in the previous disposition.") (emphasis added). Furthermore, Defendant NIC, having prevailed regarding the dismissal of the Tort Claims on its Idaho Tort Claims Act, is now *judicially estopped* from asserting that the acts alleged did not occur within the scope and course of Defendant Friis' employment. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."). Thus, Defendant NIC is *not* entitled to a judgment as a matter of law pursuant to the doctrine of Respondeat Superior, and, therefore, Defendant's Renewed Motion for Summary Judgment should be DENIED.

4. Even if the Issue Regarding Scope and Course is Not the Law of Case, There is a Genuine Issue of Material Fact Regarding Whether or Not the Alleged Acts occurred Within the Scope and Course of Defendant Friis' Employment.

In its Memorandum in Support of its Renewed Motion, Defendant NIC argues that there is no genuine issue of material fact as to whether or not the acts alleged occurred within the Scope of Course of Defendant Friis' Employment. Memorandum in Support of Motion for Summary Judgment, at 11–14. In support of this proposition, Defendant NIC points to Plaintiff's arguments in opposition to its previous Motion for Summary Judgment, regarding *additional* acts which occurred outside the scope and course of Friis' Employment. *Id.* In fact, while Plaintiff did allege acts which took place outside the scope and course of Defendant Friis' employment in its Opposition to Defendants' previous Motion for Summary Judgment, it is *clear* that these are *additional* acts, which took place *in addition to* those which took place during Friis' employment with Defendant NIC. *See* Amended Complaint, Docket No. 25; Plaintiff's Statement of Material

Facts ¶¶ 3–6 (Federal Proceeding, Docket No. 64).

For example, Plaintiff alleges that Defendant Friis made advances upon her during class in both 2001 and 2004 *at* NIC, and that some of the telephone messages did mention school related issues. *Id.* Moreover, given that Plaintiff felt that her grade could be affected by her response to Friis' advances, Affidavit of Victoria Johnson, ¶¶ 6, 8 (Federal Proceeding, Docket No. 66), a portion of Defendant Friis' conduct constituted "quid pro quo" sexual harassment, in addition to creating a hostile environment. Given that, unquestionably, Defendant Friis' authority to grant grades to his students falls within the scope and course of his employment as a professor for Defendant N.I.C., Defendant's argument regarding the scope and course of employment must necessarily fail.

In further support of its proposition regarding the scope and course of Defendant's employment, Defendant NIC relies upon traditional tests regarding respondeat superior with regard to the tortious acts of an employee, which were thoroughly discussed, and ultimately modified, in the Title VII context in the case of *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). In *Faragher*, the Defendant had raised the defense that the offending employee's actions did not take place within the scope and course of his employment, relying upon a test similar to that cited by Defendant on Page 6 of its Memorandum. *Id.* at 775. However, recognizing that (hopefully) it would be a rare instance in which conduct constituting sexual harassment would be "connected with the employer's interest," the United States Supreme Court, in *Faragher*, held that, when the offending employee is acting in a supervisory capacity, the employer may be held vicariously liable, without resort to traditional analyses regarding whether or not the acts fell within the scope and course of the employment. *Id.* at 797–804.

As such, a rational trier of fact could reasonably find, from the evidence currently on the record, that Defendant Friis was in a "supervisory capacity" over the Plaintiff, thus subjecting it to vicarious liability for Friis' actions: There is no question that, in 2004, Defendant Friis, as Plaintiff's professor, had the authority to grade her coursework, and, thus, affect her ability to, and timing of, graduation. Moreover, as in 2001, Plaintiff testified through her affidavit that, in 2004, she felt that her grade may be affected if she refused Friis' advances. Affidavit of Victoria Johnson, ¶¶ 6 and 8 (Federal Proceeding, Docket No. 66). As such, Defendant NIC is not able to escape liability for Defendant Friis' acts, absent establishing the affirmative defense, which will be addressed below. Therefore, Defendant NIC's Motion for Summary Judgment should be DENIED, and the matter should be allowed to proceed to trial.

5. Plaintiff's Claim does Not Fail Under the *Faragher* Affirmative Defense.

Next, Defendant NIC resorts to use of the Affirmative Defense set forth in the *Faragher* case. Memorandum in Support of Motion for Summary Judgment at 15–19. The affirmative defense provided by the U.S. Supreme Court in *Faragher* provides two elements: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff . . . unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher*, 524 U.S. at 807.

In this case, there is a genuine issue of material fact, such that a rational trier of could reasonably find, that Defendant NIC did *not* exercise reasonable care in "preventing and correcting promptly" Friis' sexually harassing behavior. According to Plaintiff's Affidavit, despite being placed on notice of Defendant Friis' behavior, Defendant NIC failed to take any

action. Affidavit of Victoria Johnson, ¶ 11 (Federal Proceeding, Docket No. 66). Furthermore, NIC had been placed on notice regarding previous incidents involving other students, and, yet, failed to remove Friis from the classroom, provide additional supervision, or otherwise provide prevent the harassment at issue. *Id.* at ¶¶ 12–13 ; Affidavit of Rami Amaro, Exhibits A and B (Federal Proceeding, Docket No, 65); Affidavit of Michelle Cook, ¶ 6 (Federal Proceeding, Docket No. 67). While Defendant is certainly free to argue this element of its affirmative defense at trial, the record, viewed in a light most favorable to the non-moving party, does *not* warrant a grant of Summary Judgment upon said Defense.

On the second element, again, there is a genuine issue of material fact, such that a rational trier of could reasonably find, that Defendant that the plaintiff did *not* unreasonably fail to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Initially, in addition to the actual notice regarding the harassment of the other students, Plaintiff *did* note her discomfort regarding Friis' behavior to NIC staff members, prior to filing the formal complaint. Affidavit of Victoria Johnson, ¶ 11.

Furthermore, the affirmative defense requires that, even if the Plaintiff failed to take advantage of preventive or corrective opportunities provided by the employer, that such failure be *unreasonable*. *Faragher*, 524 U.S. at 807. As such, Plaintiff's fears that her grade may be affected by her response to Friis' advances, Affidavit of Victoria Johnson, ¶¶ 6 and 8 (Federal Proceeding, Docket No. 66); in addition to similar fears on the part of other students, *see* Affidavit of Michelle Cook, ¶ 5 (Federal Proceeding, Docket No. 67), and that fact that Plaintiff believed that she would be required to take Friis' class a pre-requisite to graduation, Affidavit of Victoria Johnson, ¶ 7 (Federal Proceeding, Docket No. 66) would allow a rational trier of fact to

draw a reasonable conclusion that Plaintiff's delay in filing the formal complaint was *entirely reasonable*. Again, while Defendant NIC is perfectly free to argue its affirmative defense at trial, the weight of evidence on the record, viewed in a light most favorable to the non-movant, does *not* create a lack of a genuine issue of material fact regarding said defense. As such, Summary Judgment, again, is *not* appropriate regarding Defendants' affirmative defense and, therefore, Defendant's Motion should be DENIED.

Finally, prior to discussing the *Faragher* affirmative defense, Defendant NIC argues that no adverse educational action was taken. Memorandum in Support of Motion for Summary Judgment at 16, on file herein. Initially, with regard to adverse action, in the event that the harassment had *actually* resulted in adverse action, under *Faragher*, said action would render the affirmative defense *unavailable*. *Faragher*, 524 U.S. at 808. In the instant case, a rational trier of fact could reasonably find that the "I" grade being changed to an "F", as a direct and proximate result of Friis' conduct, Affidavit of Victoria Johnson, ¶ 9 (Federal Proceeding, Docket No. 66) constituted adverse action, which would preclude Defendant NIC's invocation of the Affirmative Defense. However, even if this Court should find otherwise, at the very least, summary judgment is improper regarding the affirmative defense based upon its elements, as set forth above, and, to the extent that Defendant NIC may assert the *Faragher* defense, it should be required to do so at trial, before the finder of fact. As such, Defendant NIC's Motion for Summary Judgment should be DENIED.

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III. CONCLUSION

WHEREFORE, for the foregoing reasons, Defendant NIC's Motion for Summary Judgment should be DENIED.

DATED this 25th day of August, 2010.

JAMES McMILLAN

Attorney for Plaintiff.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of August, 2010, I caused to be served a true and correct copy of the foregoing to the following, by the method indicated below:

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James McMillan

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Attorneys for Defendant North Idaho College

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

VICTORIA JOHNSON, Plaintiff, vs. NORTH IDAHO COLLEGE, an Idaho corporation, and DONALD FRIIS, an individual, Defendants.	Case No. CV06-7150 **DEFENDANT NORTH IDAHO COLLEGE'S MEMORANDUM IN REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Defendant North Idaho College ("NIC"), by and through its counsel of record, Naylor & Hales, P.C., submits its Memorandum in Reply to Plaintiff's Opposition to Defendant NIC's Motion for Summary Judgment. As demonstrated below, and in NIC's Memorandum in Support of Motion for Summary Judgment, there are no material facts in dispute and NIC is entitled to judgment as a matter of law on Plaintiff's sole remaining claim.

ARGUMENT

A. The Ninth Circuit's Decision Regarding the IHRA

In Plaintiff's Memorandum in Opposition to this motion for summary judgment, Plaintiff invokes the law of the case doctrine to argue that the Ninth Circuit's determination that the Idaho Human Rights Act ("IHRA") requires a Title VII analysis with respect to educational discrimination

claims is binding upon this Court. Plaintiff's Memo in Opposition, p. 5. While normally the substantive ruling of an appellate court does establish the law of a case with regards to any future proceeding in that same case, in this current proceeding there are significant issues of state versus federal law that bring into question the precedential value of a Ninth Circuit ruling regarding Idaho state law over that of an Idaho state court itself.

In ruling upon the IHRA's provision, the Ninth Circuit was clearly interpreting Title 67, Chapter 59 of the Idaho Code. This is unquestionably a state law issue. The court that has ultimate legal authority to decide what Idaho state statutes mean is not the Ninth Circuit Court of Appeals. Rather, the Idaho Supreme Court has established that it "has the ultimate responsibility to construe legislative language." *Mulder v. Liberty Northwest Ins. Co.*, 135 Idaho 52, 57 (2000). "We hold that this Court has inherent power to render decisions regarding Idaho law." *Sunshine Mining Co. v. Allendale Mut. Ins. Co.*, 105 Idaho 133, 136 (1983).

In fact, the Ninth Circuit itself has long followed the practice of certifying unclear questions of state law to the Idaho Supreme Court for a determination of those issues. In *Toner for Toner v. Lederle Laboratories, Div. of American Cyanamid Co.*, 779 F.2d 1429, 1432 (9th Cir. 1986) the Ninth Circuit ruled:

> We use our discretion to certify four questions to the Idaho Supreme Court. Certification provides a means to obtain authoritative answers to unclear questions of state law. Pursuant to Idaho procedure, we find that the following questions constitute "controlling questions of law as to which there is no controlling precedent in the decisions of the Idaho Supreme Court" and that "an immediate determination of the Idaho law with regard to these questions would materially advance the orderly resolution of the litigation."

(Citations omitted.) In this present case, the Ninth Circuit did not certify the question of whether the IHRA provides *respondeat superior* liability as to education discrimination claims. Rather, the Ninth Circuit ruled on its own what it believed the IHRA to mean.

More so, once the Ninth Circuit so ruled on the IHRA, and then remanded the case back to the U.S. District Court, that court then remanded the case back to state court without any further determination of the Plaintiff's IHRA claim, finding that a state court was the better venue in which to have this question resolved. *See Affidavit of Bruce J. Castleton in Support of Motion for Summary Judgment*, Exh. N, p. 3 (holding "remand is particularly appropriate in this instance because application of the IHRA in the context of educational discrimination has not been, as far as the Court is aware, the subject of jurisprudence by the Idaho Supreme Court or Idaho Court of Appeals").

Given this procedural history, the Ninth Circuit's ruling has ultimately been handed not to a U.S. District Court to carry out, but to this Court. This Court has no appellate relationship to the Ninth Circuit. Rather, this Court's appellate superior is the Idaho Supreme Court, the court possessing ultimate authority to interpret the IHRA. Where that is the case, this Court–as a state district court interpreting state law–has the right to pass upon questions of state law that will be ultimately reviewed by the Idaho Supreme Court with final authority on the matter.

B. Acts Not Within Course and Scope of Friis's Employment

With regards to the question of whether any of the allegedly harassing actions of Defendant Don Friis were outside the course and scope of his employment, Defendant NIC acknowledges that the authority cited by Plaintiff with regards to Title VII does hold that when a supervisor is alleged to have sexually harassed an employee, the course and scope of employment question is dealt with differently than a normal *respondeat superior* analysis that would pertain to other workplace issues. The U.S. Supreme Court case of *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), which was decided as a companion case on the same day as *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), contains an analysis regarding the question of whether a supervisor's alleged sexual harassment can be deemed to be within the course and scope of his or her employment. This analysis

ultimately concluded in that court's determination that agency issues relating to the course and scope of employment question for supervisor sexual harassment cases are to be dealt with and accounted for in the affirmative defense offered in *Faragher*.

The *Ellerth* Court held: "In order to accommodate the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees, we adopt the following holding in this case and in *Faragher* [], also decided today." 524 U.S. at 764. The *Ellerth* Court then set forth the *Faragher/Ellerth* affirmative defense when a supervisor is alleged to have sexually harassed an employee under his supervision:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile work environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instances as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

Ellerth, 524 U.S. at 765. Thus, any consideration of whether the allegedly harassing supervisor was acting within the course and scope of his employment is subsumed in the *Faragher/Ellerth* affirmative defense. If the employee suffered some adverse employment action as a result of the harassment, then the affirmative defense is not available, as "a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer." *Ellerth*, 524 U.S. at 763.

If the employee suffered no adverse employment action as a result of the harassment, then any exemption from liability or damages for the employer that may arise form the agency principles at the core of a course and scope of employment analysis can be realized by the employer through utilizing the *Faragher/Ellerth* affirmative defense.

Thus, the real issue in Defendant NIC's Renewed Motion for Summary Judgment is whether the Plaintiff has produced evidence on summary judgment that creates a genuine issue of material fact as to the *Faragher/Ellerth* affirmative defense proffered by NIC.

C. There Are No Genuine Issues of Material Fact Remaining

Plaintiff attempts to argue that, pertaining to the *Faragher/Ellerth* affirmative defense, there remain genuine issues of material fact that preclude summary judgment. These arguments are unavailing given the established factual history of this case.

1. Claims From 2001

Plaintiff alludes in her Memorandum in Opposition to alleged actions of Friis that took place during the Fall 2001 class. However, any and all claims relating to the Fall 2001 semester–including those involving the IHRA–are plainly barred by the applicable statute of limitations. Plaintiff's sole remaining claim comes through the IHRA, which specifically requires a claimant to bring a complaint of discrimination within one (1) year of the alleged unlawful discrimination. I.C. § 67-5907(1). Johnson failed to file her IHRC Charge of Discrimination until May 2005, several years after the alleged actions of Don Friis in 2001. Defendant NIC's Statement of Undisputed Material Facts, ("SOF"), ¶ 22.

2. Friis Analogized as Johnson's Supervisor

NIC itself has stated that in the current case it is likely that Friis would be treated as Johnson's supervisor for purposes of this education-Title VII analogy. NIC's Memorandum in

Support of Motion for Summary Judgment, p. 16. Thus, NIC has already acknowledged that the *Faragher/Ellerth* affirmative defense is proper here.

3. **Plaintiff's Remaining Claim Fails Under NIC's *Faragher* Affirmative Defense**

Plaintiff attempts to rebut NIC's asserted affirmative defense based on the *Faragher* decision. Plaintiff alleges that: (1) NIC did nothing in response to Johnson's claims of harassment against Friis, and (2) that Johnson did not unreasonably fail to take advantage of the preventive or corrective opportunities provided by NIC. Both claims are clearly and flatly contradicted by the evidence that has been established in the record.[1]

a. **NIC Exercised Reasonable Care to Correct the Alleged Behavior**

Johnson argues that "despite being placed on notice of Defendant Friis's behavior, Defendant NIC failed to take any action." Johnson's Memo. in Opp., pp. 9-10. This statement–based solely on Johnson's post-deposition affidavit on summary judgment–fails to take into account the multitude of evidence provided by NIC on summary judgment, which evidence includes Johnson's own deposition testimony. The record is abundantly clear that when Johnson first communicated to any NIC official that she believed Donald Friis had been sexually harassing her–which first communication took place in January 2005 to NIC counselor Judy Bundy–NIC took quick and decisive action to investigate Johnson's allegations and then to take actions based on the ultimate findings of the NIC Sexual Harassment Advisory Committee ("SHAC"). SOF ¶¶ 17- 20. When Judy Bundy first heard of Friis's alleged behavior, she communicated to Johnson that she was obligated to report these allegations to NIC. SOF ¶ 18. Bundy then took these allegations to the NIC

[1]Defendant NIC also asserts that Plaintiff's allegations here are both barred by the law of the case doctrine where the U.S. District Court explicitly found to the contrary in its decision on the matter as noted herein.

Affirmative Action officer Brenda Smith, who followed up with Johnson regarding the allegations and subsequently informed Johnson of her right to make a formal written complaint against Friis for sexual harassment. *Id.* Once Johnson made the formal complaint Smith convened the SHAC despite the fact that Johnson's complaint of sexual harassment was untimely (SOF ¶ 21), and after its full investigation of the matter the SHAC recommended the strongest punishment against Friis. SOF ¶ ¶ 19-20. Upon receiving that recommendation, NIC President Michael Burke offered Friis the option of resigning his position in lieu of termination, which Friis then did. SOF ¶ 20. Thus, Johnson's claim that "NIC failed to take any action" in response to Johnson's allegations is frivolous. And, in fact, the U.S. District Court specifically found that NIC's actions taken in response to Johnson's complaint of sexual harassment were adequate and compliant with the law. *See Affidavit of Bruce J. Castleton in Support of NIC's Motion for Summary Judgment*, Exh. K, pp. 14-16.

Johnson's next claim–that "NIC had been placed on notice regarding previous incidents involving other students"–is likewise baseless. The U.S. District Court specifically found that the 2004 report by a male student to Brenda Smith that Friis was invading his personal space "was inadequate to put NIC on notice for several reasons." *Castleton Aff.*, Exh. K, p. 13. The reports submitted by other faculty who reported seeing Friis touch a student "are not relevant to determination of the issue at hand... given they occurred after NIC already had actual notice" of Johnson's allegations. *Id.* at p. 14. These claims by Johnson and the evidence surrounding them have already been reviewed by the U.S. District Court and found insufficient to survive summary judgment.

Thus, Johnson has failed to establish any genuine issue of material fact on summary judgment rebutting the first prong of the *Faragher* affirmative defense, and the evidence is

uncontradicted that NIC exercised reasonable care to prevent and correct promptly any sexually harassing behavior.

b. Johnson Unreasonably Failed to Take Advantage of NIC Processes

As to the second prong of the *Faragher* affirmative defense, Johnson was required "to use such means as are reasonable under the circumstances to avoid or minimize the damages that result from violations of [Title VII]"). *Holly D. v. Calif. Inst. of Tech.*, 339 F.3d 1158, 1178 (9th Cir. 2003) (holding that university employee's failure to report sexual harassment until a full year after unwelcomed sexual activity was unreasonable despite employee's belief that one department of the university had not satisfactorily addressed a prior disability discrimination complaint). Typically, "a demonstration of a failure to [use a complaint procedure] will normally suffice to satisfy the employer's burden under the second element of the [*Faragher/Ellerth*] defense." *Id.*

In response to NIC's claim that Johnson failed take advantage of NIC sexual harassment complaint procedures, Johnson claims that she did not unreasonably fail to take advantage of such procedures provided by NIC. Johnson maintains that her actions in informing certain NIC employees of her discomfort with Friis prior to filing her formal complaint of harassment in February 2005 constituted an attempt on her part to comply with NIC sexual harassment reporting procedures. Memo. Opp., p. 10. The U.S. District Court has already determined that Johnson's actions in communicating mere discomfort with Friis to Judy Bundy, Judy Beckendorf, and Sharon Olson do not constitute a complaint of sexual harassment. "A comment made by a student that her professor makes her 'uncomfortable,' without more detail, cannot be equated to a complaint of sexual harassment." *Castleton Aff.*, Exh. K, p. 13.

Plaintiff also maintains that her failure to make a complaint of sexual harassment until February 2005 was not unreasonable where she claims that she feared her grade would be affected

by Friis's advances. Memo. Opp., pp. 10-11. However, the U.S. District Court has also already specifically dismissed that claim, observing in Johnson's own deposition testimony that "Johnson stated that this was just a feeling, as Friis never communicated this to her." *Castleton Aff.*, Exh. K, n.2. Thus, this statement cannot serve to create a genuine issue of material fact now.

Likewise, the statement of Michelle Cook in her affidavit that Cook feared for her grade also cannot justify Johnson's delay in waiting to report the alleged harassment, as Cook's own affidavit fails to set forth any more of a valid factual basis for her purported concern for her grade in Friis's class than Johnson's own claim has. Cook sets forth no actual facts in her affidavit that support her purported belief that her grade could be affected by how she responded to Friis. Further, Cook states in her affidavit that she only took a class from Friis in 2001, which would make her statements irrelevant to Johnson's 2004 claims. *See Affidavit of Michelle Cook in Opp. to Defendant's Motions for Summary Judgment*, ¶ 5. Johnson has entirely failed to set forth any viable evidence on summary judgment indicating that Donald Friis ever made any statement or took any action indicating to Johnson (or Cook) that her grade could possibly be impacted by Johnson's reactions to Friis's requests to date her.

On summary judgment "[t]he adverse party ... may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or otherwise provided in [Rule 56], must set forth specific facts showing there is a genuine issue for trial." *Brewer v. Washington RSA No. 8 Ltd. Partnership*, 145 Idaho 7356, 739 (2008). Johnson cannot survive summary judgment with nothing but her own subjective, conclusory assumptions about Friis's intent absent some actual evidence to support that belief. The U.S. District Court specifically noted that Johnson testified at deposition that Friis never communicated to her that her grade could be affected by her reaction to his requests. *Castleton Aff.*, Exh. K, n.2. Thus, she cannot create a genuine issue of material fact

on summary judgment by simply claiming that she believed something despite a complete lack of evidence to support that belief.

c. **There Was No Adverse Educational Action**

And, Johnson asserts that she did experience an adverse educational action when her "I" incomplete grade in Friis's class was changed to an "F" in October 2004. Memo. Opp., p. 11. Johnson claims that "a rational trier of fact could reasonably find that the "I" grade being changed to an "F," as a direct and proximate result of Friis's conduct. *Id.* This statement is belied by the weight of great evidence produced on summary judgment, as the U.S. District Court has also found (observing"[i]n Johnson's deposition, she testified that she now believes her grade was changed because she did not finish the class work within a certain amount of time"). *Castleton Aff.*, Exh. K, n.7. At deposition Johnson was asked:

> Q: Well, let me just ask you: You believe that [Friis] gave you an F because you didn't give into his advances; is that correct?
>
> A. I did believe that.
>
> Q: Has anything come to your attention that would make you believe or that would suggest that it wasn't Mr. Friis who changed your grade from an incomplete to an F?
>
> A. Yes.
>
> Q: And what was that?
>
> A: That – I guess that there was a – I haven't read it, but you have to do the work within a certain amount of time or something like that.

Castleton Aff., Exhibit A (Johnson Depo. pp. 184:24 – 185:11). The NIC Sexual Harassment Advisory Committee–the very NIC body that found against Friis and recommended the strongest possible sanction against him–specifically found through its investigation that "Victoria's incomplete automatically defaulted to an 'F' six weeks into the fall semester. There is no indication of any grade

retaliation." *Castleton Aff.*, Exh. E (NIC 53). Johnson has failed to set forth any evidence whatsoever on summary judgment to rebut this. Accordingly, her claim that a reasonable juror could find contrary to the plain and uncontradicted evidence is meritless.

d. Johnson's Claims Must Be Dismissed on Summary Judgment

Johnson concludes by arguing that "to the extent that Defendant NIC may assert the *Faragher* defense, it should be required to do so at trial, before the finder of fact." Memo. Opp., p. 11. This argument ignores the fact that Johnson is required to establish a genuine issue of material fact as to the affirmative defenses raised by NIC to survive summary judgment, just as she is required to raise a genuine issue of material fact as to the elements of her own cause of action. The Ninth Circuit has specifically upheld the dismissal of a Title VII claim based on the *Faragher/Ellerth* affirmative defense on summary judgment where the plaintiff failed to establish a genuine issue of material fact as to the *Faragher* elements. *See Holly D. v. Calif. Inst. Of Tech.*, 339 F.3d 1158, 1179 (9th Cir. 2003) (holding "because [the plaintiff] has not presented evidence sufficient to raise a genuine issue of material fact either on her 'tangible employment action' claim or on Caltech's affirmative defense to her hostile environment claim, we affirm the district court's grant of summary judgment to Caltech on her Title VII claim").

Accordingly, Johnson's failure to bring forth evidence on summary judgment that creates a genuine issue of material fact as to the *Faragher/Ellerth* affirmative defense must result in the dismissal of Johnson's IHRA claims on summary judgment.

CONCLUSION

For the reasons stated above, and in its Memorandum in Support of Renewed Motion for Summary Judgment, Defendant NIC asks that this Court dismiss Johnson's IHRA claim on summary judgment with prejudice.

Dated this 1st day of September, 2010.

NAYLOR & HALES, P.C.

By _____
Bruce J. Castleton, Of the Firm
Attorneys for Defendant North Idaho College

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of September, 2010, I caused to be served, by the method(s) indicated, a true and correct copy of the foregoing upon:

James McMillan Attorney at Law 415 Seventh Street, Ste. 7 Wallace, ID 83873 *Attorney for Plaintiff*	___ ___ ___ X	U.S. Mail Hand Delivered Federal Express Fax Transmission (208) 752-1900
Peter C. Erbland Paine Hamblen, LLP 701 Front Ave., Ste. 101 P.O. Box E Coeur d'Alene, ID 83816-2530 *Attorneys for Def. Friis*	___ ___ ___ X	U.S. Mail Hand Delivered Federal Express Fax Transmission (208) 664-6338

_____
Bruce J. Castleton

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STATE OF IDAHO } ss
COUNTY OF KOOTENAI
FILED: 10-15-10
AT 5:00 O'CLOCK P M
CLERK, DISTRICT COURT
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNT OF KOOTENAI

VICTORIA JOHNSON, an individual Plaintiff, vs. NORTH IDAHO COLLEGE, an Idaho Corporation; and DONALD FRIIS, an individual, Defendants.	CASE NO. CV-06-7150 MEMORANDUM DECISION AND ORDER RE: DEFENDANT NORTH IDAHO COLLEGE'S MOTION FOR SUMMARY JUDGMENT

James M. McMillan, for Plaintiff
Bruce J. Castleton, NAYLOR & HALES, P.C., for Defendant North Idaho College

I. FACTUAL AND PROCEDURAL HISTORY

The basis of this lawsuit is the alleged sexual harassment of Plaintiff Victoria Johnson ("Johnson") by Donald Friis ("Friis"), formerly a professor at Defendant North Idaho College ("NIC"). Johnson, a non-traditional student at age forty-four, began attending NIC in the Fall of 2001. The alleged sexual harassment began that Fall when Johnson was enrolled in Friis' introductory computer class. Johnson alleges that, during this computer class, Friis flirted with her and generally acted inappropriately toward her,

and that he went to breakfast with her and a fellow student. At this breakfast, Friis allegedly inquired about Johnson's dating situation, to which Johnson replied that she was not interested in dating and wanted to focus on school. Johnson alleges that, after this incident, Friis treated her negatively, degrading and humiliating her. She further alleges that Friis indicated her grade would be affected by her response to his actions, although Johnson's deposition testimony is that this was just her feeling. According to Johnson, this behavior, among other causes, forced her to withdraw from this class.

Following the Fall 2001 semester, Johnson lost her financial aid because she failed to complete the required number of classes during the semester. Johnson then met with Judy Bundy, her counselor at NIC, to discuss her options. At this meeting, Johnson told Ms. Bundy that Friis made her uncomfortable.

In January of 2004, Johnson met with Judy Beckendorf, an academic advisor at NIC, to enroll for the Spring 2004 semester. Ms. Beckendorf suggested to Johnson that she needed to complete the introductory computer class. Johnson was informed that Friis would again teach this class, and Johnson enrolled in the class hoping that his behavior would improve. Instead, Friis' alleged behavior, which persisted during the Spring of 2004, was that Friis was overly nice to Johnson, flirting with her and inappropriately touching her.

During the Spring 2004 semester, Johnson hired Sharon Olson, Friis' teaching assistant, as a tutor. At some point, Johnson informed Ms. Olson that Friis made her uncomfortable; however, Johnson did not state that she believed Friis was engaging in sexual harassment of her.

After the mid-term of the Spring 2004 semester, Johnson stopped attending class and did not complete any assignments. Johnson then requested that Friis provide her with a grade of "incomplete" and Friis agreed to do so, even though Johnson had not completed the required class work and had a grade of "D-" at the mid-term. Pursuant to NIC policy, the "incomplete" grade automatically changed to a grade of "F" due to Johnson not completing the class within the required academic time period.

Johnson alleges that Friis contacted her several times over the Summer of 2004, while her grade was still pending, asking her out on dates and leaving her inappropriate messages. Johnson then met again with Judy Bundy to discuss enrolling at NIC for the Spring 2005 semester. At this meeting Ms. Bundy informed Johnson that her "incomplete" grade had converted into an "F." Johnson then informed Ms. Bundy of the alleged sexual harassment by Friis and felt, incorrectly, that the grade change was a result of Friis' retaliation. Ms. Bundy informed Johnson that due to what Johnson had told her she was obligated to report Friis' behavior to NIC.

Ms. Bundy contacted Brenda Smith, NIC's affirmative action officer charged with receiving reports of sexual harassment. Ms. Smith informed Johnson that Johnson could make a formal complaint, and Johnson did so, filing her formal complaint in February 2005. Further, Smith followed NIC policy by informing Friis of the allegations and giving him an opportunity to respond; Smith also convened NIC's Sexual Harassment Advisory Committee ("SHAC") to investigate the allegations. The SHAC determined that Friis had violated NIC's sexual harassment policy by asking Johnson out on dates

while controlling her grade, and recommended the strongest possible sanction[1]. Further, the SHAC determined that no grade retaliation had taken place.

In May of 2005, Johnson filed an administrative complaint with the Idaho Human Rights Commission ("IHRC") alleging discrimination against NIC. Johnson then filed her Complaint within the 90-day right to sue period in the District Court for the First Judicial District for the State of Idaho, Kootenai County, which was removed, by stipulation of the parties, to the Federal District Court for Idaho based on federal question jurisdiction. The Complaint included several claims against both NIC and Friis, including Negligent Supervision/Hiring/Retention against NIC and Sexual Harassment, Negligent and Intentional Infliction of Emotional Distress, Gender Discrimination in Violation of Title IX of the Federal Civil Rights Act and the Idaho Human Rights Act ("IHRA"), Assault and Battery, and punitive damages against Friis and NIC as Friis' employer.

Defendants NIC and Friis filed Motions to Dismiss all tort allegations based on Johnson's failure to satisfy the notice requirement of the Idaho Tort Claims Act. The Federal District Court granted the Motions to Dismiss, finding that Johnson had failed to satisfy the notice requirement of the Act. Defendants NIC and Friis then filed Motions for Summary Judgment on the remaining Title IX and IHRA claims. The Federal District Court determined that Title IX standards applied to NIC's Motion for Summary Judgment on Johnson's claim under the IHRA, and granted in total NIC's and Friis' Motions for Summary Judgment.

[1] Eventually, NIC offered Friis the option of resignation in lieu of termination, which he accepted. He left NIC in June 2005. All Johnson's claims against Friis, individually, were dismissed by the Federal District Court of Idaho.

Johnson then appealed to the United States Court of Appeals for the Ninth Circuit. That court affirmed the Federal District Court's granting of summary judgment to both Defendants, with the exception that summary judgment for NIC on Johnson's IHRA claim was reversed. The Ninth Circuit determined that the applicable standard to apply to the IHRA claim was a Title VII standard allowing for respondeat superior liability. That sole issue was remanded to the Federal District Court for further proceedings, and that court remanded the issue to this Court.

II. STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c); *Bonz v. Sudweeks,* 119 Idaho 539, 541, 808 P.2d 876, 878 (1991). In ruling upon a motion for summary judgment, all disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the nonmoving party. *Bonz,* 119 Idaho at 541, 808 P.2d at 878. The burden of proving the absence of material facts is upon the moving party. *Petricevich v. Salmon River Canal Co.,* 92 Idaho 865, 868, 452 P.2d 362, 365 (1969).

Once the moving party has properly supported the motion for summary judgment with affidavits, admissions or depositions, it is incumbent on the nonmoving party to present opposing evidence through depositions, discovery responses and affidavits sufficient to create a genuine issue for trial. I.R.C.P. 56(e); *Celotex Corp. v. Catrett,*

477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Petricevich,* 92 Idaho at 868, 452 P.2d at 365.

To withstand a motion for summary judgment, the nonmoving party's case must consist of more than speculation, it must create a genuine issue regarding a material fact. *G & M Farms v. Funk Irrigation Co.,* 119 Idaho 514, 517, 808 P.2d 851, 854 (1991). A mere scintilla of evidence is not enough to create a genuine issue. *Id.* If the evidence presented by the nonmoving party fails to raise a genuine issue for trial, summary judgment shall be entered against that party. I.R.C.P. 56(e).

In considering the evidence presented in support of or opposition to a motion for summary judgment "a court will consider only that material contained in affidavits or depositions which is based upon personal knowledge and which would be admissible at trial." *Petricevich,* at 869, 452 P.2d (1969); I.R.C.P. 56(e). When there is a conflict in the evidence which is presented, a determination should not be made on summary judgment if the credibility can be tested by testimony in court before the trier of fact. *Argyle v. Slemaker,* 107 Idaho 668, 691 P.2d 1283 (Ct.App. 1984).

The purpose of summary judgment proceedings is to eliminate the necessity of trial where facts are not in dispute and where existent and undisputed facts lead to a conclusion of law which is certain. *Berg v. Fairman,* 107 Idaho 441, 444, 690 P.2d 896 (1984).

III. DISCUSSION

A. IT IS APPROPRIATE IN THIS CASE TO APPLY TITLE VII STANDARDS TO THE IHRA CLAIM

Despite the Ninth Circuit ruling, NIC argues that Johnson's IHRA claim is governed by the more restrictive Title IX standards, as opposed to the Title VII standards

that allow for respondeat superior liability. This Court concludes that it is appropriate to apply the Title VII standard in the instant situation. The IHRA provides a private right of action for money damages against "educational institutions" that discriminate on the basis of gender, I.C. § 67-5909(7), and defines "educational institution" to include "an agent of an educational institution," I.C. § 67-5902(10). Such language provides for respondeat superior liability.

B. TITLE VII ANALYSIS

NIC argues that, even under a Title VII analysis, Johnson must show that Friis' conduct was within the scope and course of his employment, and that Johnson must establish evidence that puts at issue the elements of the so-called "*Faragher*" affirmative defense. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), provides for the affirmative defense to gender discrimination in employment contexts, if the employer (educational institution) took reasonable care to prevent and promptly correct a discriminatory situation, and the employee (student) unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer (educational institution) to avoid harm.

1. Scope of Employment

This Court finds that there are genuine issues of material fact about whether Friis' alleged discriminatory conduct occurred within the scope of his employment. This is so even if the analysis includes only those alleged acts between January of 2004 and Friis' resignation in June of 2005.

There are facts in the record by which a reasonable trier of fact, here a jury, could conclude that Friis engaged in discriminatory conduct in the overall context of a teacher-

student relationship, that some of the alleged misconduct occurred in a classroom setting, and that some of the alleged conduct occurred while Friis had control of Johnson's grade. The nexus of the relationship between Johnson and Friis is her status as student and his status as instructor.

2. *Faragher* Affirmative Defense

The record before this Court is clear that NIC took reasonable care to prevent and promptly correct such an alleged discriminatory situation; however, this Court finds the existence of genuine issues of material fact as to whether Johnson acted reasonably to take advantage of preventative or corrective opportunities provided by NIC. This Court cannot say, from a standard of viewing the record in the light most favorable to Johnson, that her conduct was unreasonable as a matter of law.

The road to Johnson's education goals seemed to lead inexorably through Friis' computer class. A reasonable jury could conclude that Johnson was justified in the hope that Friis' behavior in class would improve in the Spring of 2004, and that Friis was conferring a benefit to Johnson by allowing an incomplete grade when she requested one. The jury could conclude that, in light of Johnson needing Friis' cooperation in that "incomplete" grade, that it was understandable that she did not fully disclose Friis' conduct to NIC until she learned her "incomplete" grade had been converted to an "F." At that point it appears she believed, although mistakenly, that Friis' behavior had prejudiced her educational efforts in a very concrete way.

Thus, this Court finds the record to contain genuine issues of material fact regarding NIC's *Faragher* affirmative defense.

IV. CONCLUSION AND ORDER

For the above stated reasons, this Court **DENIES** Defendant NIC's Motion for Summary Judgment, finding genuine issues of material fact as to:

1. Did Friis' alleged conduct occur within the course and scope of his employment?; and,

2. Did Johnson unreasonably fail to take advantage of any preventative or corrective opportunities provided by NIC to avoid harm, as required by *Faragher*?

Therefore, IT IS HEREBY ORDERED that Defendant NIC's Motion for Summary Judgment is **denied.**

DATED this 15 day of October, 2010.

Lansing L. Haynes
LANSING HAYNES, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 15 day of October, 2010 a true and correct copy of the foregoing was mailed, postage prepaid, or sent by interoffice mail to:

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

VICTORIA JOHNSON,

Plaintiff,

vs.

NORTH IDAHO COLLEGE, an Idaho corporation, and DONALD FRIIS, an individual,

Defendants.

Case No. CV06-7150

DEFENDANT NORTH IDAHO COLLEGE'S MOTION FOR RECONSIDERATION

Defendant North Idaho College, by and through its counsel of record, Naylor & Hales, P.C., hereby files its Motion for Reconsideration of the Court's October 15, 2010 Memorandum Decision and Order re: Defendant North Idaho College's Motion for Summary Judgment. This motion is made pursuant to I.R.C.P. Rule 11(a)(2)(B). For the reasons stated below, Defendant North Idaho College ("NIC") respectfully requests the Court to reconsider its prior decision and grant summary judgment to NIC on Plaintiff's remaining claim.

I.
THE ISSUE OF COURSE AND SCOPE OF EMPLOYMENT IS SUBSUMED WITHIN THE *FARAGHER/ELLERTH* AFFIRMATIVE DEFENSE DOCTRINE

In its Memorandum Decision and Order this Court found a genuine issue of material fact as to whether the acts of alleged harassment by Defendant Don Friis occurred within the course and scope of his employment with NIC. Memorandum Decision and Order, pp. 7-8. Admittedly, Defendant NIC raised the issue of the course and scope of Friis's actions in its initial summary judgment briefing. NIC initially argued that all pertinent actions of Defendant Friis vis-á-vis Johnson's allegations of sexual harassment occurred outside the course and scope of Friis's employment as an instructor for NIC, and therefore NIC should not be liable for the same.

However, Plaintiff Johnson responded to this argument in her Opposition to Defendant North Idaho College's Motion for Summary Judgment by pointing out that under the U.S. Supreme Court's decision in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1988), when the alleged harasser is in a supervisory position over the victim, the issue of course and scope of an alleged harasser's employment is subsumed into the *Faragher* affirmative defense afforded employers under Title VII (arguing "when the offending employee is acting in a supervisory capacity, the employer may be held vicariously liable, without resort to traditional analyses regarding whether or not the acts fell within the scope and course of the employment." (Plaintiff's Memorandum in Opposition to Motion for Summary Judgment, p. 8.)

NIC then acknowledged in its summary judgment reply brief that Johnson was correct in this assertion. NIC cited to the U.S. Supreme Court case of *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 775 (1998), which is the companion case to *Faragher*. *Ellerth* sets forth that under Title VII cases of this sort, if the employee suffered some adverse employment action as a result of the sexual

harassment of a supervisor, then "a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer." *Ellerth*, 524 U.S. at 763, quoted in NIC's Memorandum in Reply to Plaintiff's Opposition to Defendant's Motion for Summary Judgment ("Reply Memorandum"), p. 4. If, on the other hand, there was no adverse employment action, then the employer is allowed to attempt to prove the *Faragher* affirmative defense elements. Thus, the question of whether the harassing supervisor acted within the course and scope of his/her employer is determined through the employer's use of the *Faragher* affirmative defense. *See* NIC's Reply Memorandum, pp. 3-5.

As such, the parties (and this Court) need not attempt to establish whether Friis's conduct fell within the course and scope of his employment. NIC's attempt to assert the *Faragher* affirmative defense establishes the same claim to protection from liability from Johnson's claims. Under the *Faragher* Title VII analysis–which analysis is the established Title VII *respondeat superior* test when a supervisor is alleged to have harassed a subordinate–there is no independent element regarding course and scope of employment of the harasser's actions. Rather, *Faragher's* elements control.

Accordingly, this Court's finding of a genuine issue of material fact regarding the course and scope of Friis's employment is unnecessary, and Defendant NIC asks this Court to reconsider its prior Memorandum Decision and omit the same. NIC is no longer raising any independent defense regarding the course and scope of Friis's actions, as NIC is relying instead upon the *Faragher* framework for a resolution of Plaintiff's *respondeat superior* claim.

II.
AS A MATTER OF LAW JOHNSON UNREASONABLY FAILED TO TAKE ADVANTAGE OF CORRECTIVE PROCEDURES PROVIDED BY NORTH IDAHO COLLEGE

This Court found in its Memorandum Decision and Order that there was a genuine issue of material fact as to whether Plaintiff Johnson unreasonably failed to take advantage of NIC's corrective procedures to cure Friis's alleged harassment. This Court found:

> The road to Johnson's educational goals seemed to lead inexorably through Friis's computer class. A reasonable jury could conclude that Johnson was justified in the hope that Friis's behavior in class would improve in the Spring of 2004, and that Friis was conferring a benefit upon Johnson by allowing an incomplete grade when she requested one. The jury could conclude that, in light of Johnson needing Friis's cooperation in that "incomplete" grade, that it was understandable that she did not fully disclose Friis's conduct to NIC until she learned her "incomplete" grade had been converted to an "F." At that point it appears she believed, although mistakenly, that Friis' behavior had prejudiced her educational efforts in a very concrete way.

Memorandum Decision and Order, p. 8. This Court appears to hold above that Johnson's delay in reporting Friis's harassment may be deemed by a jury to be reasonable because (1) Johnson believed Friis's behavior towards her would improve in the Spring 2004 class in comparison to his behavior during the Fall 2001 class; (2) Friis was conferring a benefit upon Johnson by giving her the "I" grade when it was in contravention of campus policies; (3) Johnson needed Friis's cooperation in getting the "I" grade, she feared he may withdraw that benefit to her if she reported his behavior; and (4) it was not until Johnson believed Friis had prejudiced her educational efforts in a concrete way that she would be inclined to report his prior behavior. It is Defendant's contention that none of these reasons can, as a matter of law–and assuming the truthfulness of the facts alleged and viewing

all relevant evidence in a light most favorable to Johnson–constitute a reasonable delay in reporting Friis's behavior.[1]

In defining the Defendant's arguments here, it is important to set forth the rationale behind the *Faragher* affirmative defense. This defense is–as the Court is well aware–an affirmative defense to a claim of *respondeat superior* liability. In this setting, NIC is contending that it never had notice of Friis's alleged harassment of Johnson until an actual report of harassment was made in January 2005 (to which NIC responded quickly and adequately). The two elements of the *Faragher* affirmative defense are that (1) NIC had policies and procedures in place to address claims of harassment, and (2) Johnson unreasonably failed to utilize these. Thus, *Faragher* is meant to provide a means by which the employer–or NIC, in this case by legal analogy–can stop and mitigate any harm that is occurring as a result of the harassment of one of its employees before that behavior becomes severe or pervasive. By providing an anti-harassment policy and making sure its students and staff were well aware of it, NIC was affirmatively establishing its opposition to such harassment and notifying students and staff how they could report the harassment to NIC and allow NIC to end the harassment.

However, in order for the harassment to truly be stopped, *Faragher* then places the responsibility upon the victim to come forth and report the harassment promptly so that NIC can then take steps to stop it. If the victim fails to take advantage of the processes afforded by NIC, then

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[1]Defendant NIC also notes that the only reasons given by Plaintiff in her Opposition to NIC's Motion for Summary Judgment as to why her delay in reporting was reasonable was that (1) she feared her grade may be affected by her response to Friis's advances, and (2) she believed she would be required to take Friis's class as a prerequisite to graduation. Plaintiff's Opp. To NIC's MSJ, p. 10-11. These two reasons, taken together at face value, constitute a fear of retaliation, in that Johnson feared Friis would give her a negative grade in a class she needed to graduate if she didn't respond appropriately to his advances.

under *Faragher* NIC cannot be held liable for the harassment (if it did not otherwise know about it). *See Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1178 (9th Cir. 2003) (holding that the second prong of *Faragher* "is intended to fulfill a policy imported from the general theory of damages, that a victim has a duty to use such means as are reasonable under the circumstances *to avoid or minimize the damages* that result from violations of the statute" (emphasis added)).[2] This is why the second prong of *Faragher* is typically satisfied by a showing that the employee failed to utilize the employer's complaint procedure. *Id.*; *see also Faragher*, 524 U.S. at 807-08. This is key, because if the victim does not promptly report the harassment, NIC cannot mitigate the harm done by the harasser. Thus, *Faragher* shields NIC from any liability for damages that would not have occurred had the victim promptly reported the harassment.

The U.S. Court of Appeals for the Eleventh Circuit analyzed the second *Faragher* prong as follows:

> The rules of [*Faragher* and *Ellerth*] place obligations and duties not only on the employer but also on the employee. One of the primary obligations that the employee has under those rules is to take full advantage of the employer's preventative measures. The genius of the *Faragher-Ellerth* plan is that the corresponding duties it places on the employers and employees *are designed to stop sexual harassment before it reaches the severe or pervasive stage* amounting to discrimination in violation of Title VII. But that design only works if employees report harassment promptly, earlier instead of later, and the sooner the better.

Baldwin v. Blue Cross/Blue Shield of Alabama, 480 F.3d 1287, 1306-07 (11th Cir. 2007) (emphasis added). In other words, the employee–or in this case, Johnson–hinders and even nullifies the very

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[2]Defendant NIC cites to federal case law analyzing *Faragher* and *Ellerth* because there are no Idaho state court cases dealing with the same to Defendant's knowledge. Further, the Idaho Supreme Court has consistently stated that Idaho Code § 67-5901 (the statement of purpose of the Idaho Human Rights Act) "allows our state courts to look to federal law for guidance when interpreting the Idaho Human Rights Act." *Stout v. Key Training Corp.*, 144 Idaho 195, 197 (2007).

protections created for her when she fails to promptly report the harassing behavior directed towards her.

In this case, Victoria Johnson waited until well after Friis's behavior towards her had stopped completely before she reported it to NIC. Johnson claims Friis began his harassment of her in the Fall 2001 semester, and then again during the Spring 2004 semester, and during the summer of 2004. In August 2004, Johnson communicated her disapproval of Friis's behavior to him, after which Friis never contacted her again. Then, *five months* transpired during which there was no contact between Friis and Johnson, let alone any harassing behavior. Thus, when Johnson finally reported Friis's behavior to NIC there was no longer any ongoing harassment to attempt to curtail. The damage had already been done, and NIC had no way of stopping it. *See Mukaida v. Hawaii*, 159 F.Supp.2d 1211, 1231 (D.Hawaii 2001) (observing "[b]ecause she waited until the harassment had ended, [the plaintiff] never gave the State or UH an opportunity to correct the alleged sexual harassment," finding the plaintiff's delay in reporting unreasonable).

A. Fear of Retaliation is Unreasonable as a Matter of Law

This Court and Johnson both cite Johnson's fear that Friis may take away her "I" grade as one of the reasons a jury might find Johnson's delay in reporting Friis's behavior reasonable. Indeed, many plaintiffs facing the *Faragher* affirmative defense claim that they delayed reporting or never reported the harassment against them out of fear of retaliation by the harasser. And yet courts dealing with this issue have consistently held that as a matter of law fear of retaliation alone is unreasonable under the *Faragher* second prong. The Eleventh Circuit in *Baldwin* expressed this very succinctly:

> Baldwin (the plaintiff) waited too long to complain. Her complaint came three months and two weeks after the first proposition incident and three months and one

> week after the second one. That is anything but prompt, early, or soon. Baldwin argues that her delay in reporting the harassment was reasonable because she had good reasons for not doing so sooner. An employee in extreme cases may have reasons for not reporting harassment earlier that are good enough to excuse the delay, but the ones that Baldwin puts forth are not. Baldwin says that she waited to file her complaint until November 8, 2001–three months after the solicitation in Head's office at the very end of July–because she feared being fired and felt silence would best serve her career interests. Her goal, she testified, was to "just go along to get along." While we have recognized that filing a sexual harassment complaint may be "uncomfortable, scary, or both," we have also explained that "the problem of workplace discrimination ... cannot be corrected without the cooperation of the victims." The *Faragher* and *Ellerth* decisions present employees who are victims of harassment with a hard choice: assist the prevention of harassment by promptly reporting it to the employer, or lose the opportunity to successfully prosecute a Title VII claim based on harassment. Every employee could say, as Baldwin does, that she did not report the harassment earlier for fear of losing her job or damaging her career prospects. As the First Circuit has explained, the Supreme Court undoubtedly realized as much when it designed the *Faragher-Ellerth* defense, but it nonetheless decided to require an employee to make the choice in favor of ending harassment if she wanted to impose vicarious liability on her employer. Were it otherwise, the *Faragher-Ellerth* defense would be largely optional with plaintiffs, and it would be essentially useless in furthering the important public policy of preventing sexual harassment.

Id. Indeed, the court in *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 267 (4th Cir. 2001) observed that "[b]y advancing a speculative 'fear of retaliation' excuse for remaining silent, Barrett's argument would undermine the primary objective of Title VII and could result in more, not less, sexual harassment going undetected." In other words, by not reporting the harassment, the plaintiff wholly undermines the protective measures of Title VII.

Numerous other courts across the jurisdictions have found the same. *See Adams v. O'Reilly Automotive, Inc.*, 538 F.3d 926, 932-33 (8th Cir. 2008) (holding "[w]e do not believe that a fear of retaliation is generally a proper excuse for failing to report sexual harassment" and "[t]o excuse a victim from the duty to alert the proper authorities through proper channels specifically discourages the best hope of exposing and eliminating sexual harassment [] [and] [n]ormally bringing a

retaliation claim, rather than failing to report sexual harassment, is the appropriate response to the possibility of retaliation"); *Jernigan v. Alderwoods Group, Inc.*, 489 F.Supp.2d 1180 (D.Oregon 2007) (holding "an employee's subjective fears of confrontation, unpleasantness or retaliation do not alleviate the employee's duties under *Ellerth* to alert the employer to the allegedly hostile environment") citing *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 813 (7th Cir. 1999); *Beyer v. Baker School Dist.*, 2005 WL 351936 *8 (D.Oregon) ("a generalized fear of retaliation cannot justify a failure to report sexual harassment"); *Speaks v. City of Lakeland*, 315 F.Supp.2d 1217, 1228 (M.D.Fla. 2004) (finding "subjective fears of reprisal may exist in every case, but those fears, standing alone, do not excuse an employee's failure to report a supervisor's harassment"); *Verges v. Shelby County Sheriff's Office*, 2010 WL 2696764 *10 (W.D. Tenn.) (holding that a "generalized fear of retaliation unaccompanied by any objective evidence to substantiate that fear, however, is, as a matter of law, insufficient to justify an employee's failure to comply with a reporting policy"); *E.E.O.C. v. Restaurant Co.*, 490 F.Supp.2d 1039, 1049 (D.Minn. 2007) (holding "an employee's subjective fears of retaliation do not alleviate the employee's duty to alert the employer to the harassment"); *see also Lyle v. ESPN Zone*, 292 F.Supp.2d 758 (D.Maryland 2003); *Clark v. United Parcel Service, Inc.*, 286 F.Supp.2d 819 (W.D.Ky. 2003), overturned on other grounds; and *Murray v. Chicago Transit Auth.*, 252 F.3d 880 (7th Cir. 2001) (holding "[a]lthough Murray claims she feared further harassment if she reported her actions, her subjective fears of confrontation, unpleasantness, or retaliation do not alleviate her duty under *Ellerth* to alert the employer to the allegedly hostile environment").

Victoria Johnson may well have subjectively feared that by reporting Friis's behavior to NIC her "I" grade may have been jeopardized or she may have faced other retaliation from Friis, but that

is not a reasonable excuse for waiting to report the harassment. Johnson has provided to this Court no evidence that Friis ever communicated to her in any manner any threat or implication of retaliation in any circumstances. As NIC demonstrated on summary judgment, Johnson admitted at deposition that her fear her grade would be affected by her responses to Friis's advances was entirely her own subjective thought, and she acknowledged Friis neither said nor did anything to give credence to that fear. *See Castleton Aff.*, Exh. A (Johnson Deposition Vol. I, p. 116:7 – 117:2); Exh. K, n.2. Johnson has admitted that these fears of retaliation she had were entirely subjective to her, and that Friis never indicated the same.

There are some exceptional reasons observed by courts that excuse a plaintiff's delay or failure to report. These often include situations where the plaintiff has communicated harassment to the employer once but the employer failed to act, thus making the plaintiff credibly and objectively believe that a second report would be futile. Further, some courts have excused a plaintiff's failure to timely report harassment on the basis of a *credible* fear of retaliation.[3] This credible fear "must be based on more than the employee's subjective belief," and must be shown by affirmative evidence proffered by the plaintiff. This proof must be "evidence that the employer has ignored or resisted similar complaints or has taken adverse actions against employees in response to such complaints." *Cruz v. Liberatore*, 582 F.Supp.2d 508, 526-27 (S.D.N.Y. 2008), citing *Leopold v. Baccarat, Inc.*,

[3]However, as explained in the 11th Circuit's decision in *Baldwin* above, many courts will not excuse a delay or failure to report harassment even when there is a credible and substantiated fear of retaliation, as Title VII also provides a cause of action to an employee for retaliation against an employer who takes an adverse employment action against an employee for filing a claim of discrimination under Title VII.

239 F.3d 243, 245 (2nd Cir. 2001).[4] Absent this credible threat of retaliation, there is no reasonableness in an employee's failure to report based on fear of retaliation (*see Weger v. City of Ladue*, 500 F.3d 710, 725 (8th Cir. 2007) (holding "where the alleged harassing supervisor never told employee that her job was in jeopardy, nor did he threaten her with physical harm, the employee did not reasonably avail herself of the protections afforded by her employer's antiharassment policies") quoting *Walton v. Johnson,* 347 F.3d 1272, 1291 (11th Cir. 2003)).

Other similar reasons proffered by plaintiffs for delay in reporting harassment have been rejected by courts as unreasonable as a matter of law, including a plaintiff's contention that she delayed reporting harassment until she could find a corroborating witness to support her claims (*Adams v. O'Reilly Automotive, Inc.*, 538 F.3d 926 (8th Cir. 2008), and a plaintiff's contention that she did not report sexual harassment to her employer because the employer had not handled her unrelated disability discrimination claim to her satisfaction (*Holly D. V. Cal. Ins. of Tech.*, 339 F.3d 1158 (9th Cir. 2003)). Courts have also rejected an employee's subjective belief that his or her report of harassment to the employer would be futile as a reasonable excuse for delay or failure to report harassment (*Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 268 (4th Cir. 2001); *see also Mangrum v. Republic Ind., Inc.*, 260 F.Supp.2d 1229 (N.D. Ga. 2003)). Given these cases, it is clear that only in extraordinary cases will a court excuse a plaintiff's delay or failure to report sexual harassment. Johnson has provided no such extraordinary circumstances here, only claiming a subjective and unsubstantiated fear of retaliation for her failure to report.

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[4]Note that in these cases the plaintiff is required to prove the employer–not the supervisor–would have retaliated against the employee for reporting harassment. Johnson's alleged fears of retaliation are focused solely on Friis.

B. **The Time Johnson Waited to Report is Significant**

Johnson claims she was first harassed by Friis during the Fall 2001 semester. She admits she never reported his actions to any NIC official regarding that alleged harassment until January 2005 when she told Judy Bundy. This constitutes a delay of over three years in reporting Friis's conduct.

Johnson also claims Friis harassed her during the time she was enrolled in his class in the Spring 2004 semester. She dropped out of school midway through the semester. Yet she again delayed any report to NIC of this harassment until January 2005, constituting a delay of between nine months and a year.

And, Johnson alleges she was harassed by Friis during the summer of 2004, leading up to August 20, 2004, when she finally informed Friis his actions were not welcomed. Yet she waited until January 2005 to report this as well, a delay of nearly five months. And what is important here is the fact that during these four months Johnson had no contact with Friis, and in fact had no contact with him ever again after that August 20 conversation. Yet still she delayed her report of Friis's behavior until that following January.

NIC's antiharassment policy and procedure required Johnson to report any sexually harassing behavior within ninety (90) days of the occurrence. *Affidavit of Bruce J. Castleton in Support of NIC's Motion for Summary Judgment*, Exhibit J, ¶ 12. Had Johnson complied with this requirement in 2001, NIC could have prevented all of Friis's conduct in 2004. Had Johnson complied with this requirement upon again experiencing Friis's harassment in the Spring 2004 class, NIC could have prevented Friis's conduct during that time period. Instead, Johnson waited until her interaction with Friis had come to an end before notifying NIC of the harassment.

This delay in notifying NIC of Friis's actions is material, as courts have found that the time period of delay in reporting affects the employer's ability to eradicate the harassment before it becomes severe or pervasive. *See Baldwin*, 480 F.3d at 1307 (finding that delay of three months and two weeks to report was unreasonably); *Hardage v. CBS Broadcasting, Inc.*, 427 F.3d 1177 (9th Cir. 2005) (holding employee's failure to report harassment for six months was unreasonable as a matter of law under *Faragher*); *Holly D. V. Cal. Inst. of Tech.*, 339 F.3d 1158, 1178-79 (9th Cir. 2003) (holding plaintiff's failure to report unwelcome conduct until one year after the most recent activity and two years after the first incident was unreasonable as a matter of law); *Scrivner v. Socorro Indep. Sch. Dist.*, 169 F.3d 969, 972 (5th Cir. 1999) (holding eight month delay in reporting harassment was unreasonable); *McCurdy v. Arkansas State Police*, 375 F.3d 762, 773 (9th Cir. 2004) (observing "if [harasser] had engaged in his harassing conduct for months and McCurdy had not reported him, the ASP would not be liable for [his] harassment"); *Pinkerton v. Colo. Dept. of Transp.*, 563 F.3d 1052 (10th Cir. 2009) (holding that a delay of two and a half months in reporting harassing behavior was unreasonable under *Faragher/Ellerth*); *Williams v. Missouri Dept. of Mental Health*, 407 F.3d 972 (8th Cir. 2005) (holding a delay of four months in reporting was unreasonable); and *Finnerty v. William H. Sadlier, Inc.*, 176 Fed.Appx. 158 (2nd Cir. 2006) (ruling three-year delay in reporting unreasonable).

The length of Johnson's delay in reporting Friis to NIC is substantial and material to the question at hand. Johnson waited over three years to report the harassment that occurred in the Fall 2001 semester, and she waited between five months to a year to report the harassment that occurred in 2004. Without question she failed to report any harassment within the 90-day window required by NIC. This delay is material evidence of the unreasonableness of Johnson's delay, particularly

where Johnson has not provided any evidence of a valid, substantiated reason why she waited so long.

C. Johnson's Reason for Reporting Friis is Inconsistent with *Faragher*

It is significant that Johnson did not report Friis's behavior until she mistakenly believed he had changed her "I" grade to an "F." This occurred during her meeting with Judy Bundy in January 2005 when she was again preparing to re-start classes at NIC. It can be easily surmised from these facts that had Johnson not met with Bundy at that time, or had Bundy not looked at Johnson's grades during that meeting, that Johnson would likely have delayed her reporting of Friis's conduct well beyond January 2005. This is easily inferred because this was the second time Johnson was trying to re-start her classes at NIC after having dropped out in the middle of a semester. Johnson dropped out during the Fall 2001 semester and re-started her classes in January 2004 after meeting with her advisor, Judy Beckendorf. At that time, Johnson decided to retake the computer class from Friis despite the harassment she claims she received from him in 2001. Johnson made no report of Friis's behavior to NIC upon re-starting classes in 2004, though she claims his behavior caused her to drop out of school. Had she not seen the "F" grade in the computer class in January 2005, and mistakenly believed that Friis had taken negative action against her by the grade change, it is reasonable to believe Johnson would have continued with her education at NIC without notifying that school of Friis's past behavior. After all, Johnson had notified Friis that prior August of her rejection of his advances and Friis had complied with her request that he stop contacting her.

Given the facts of this case, it is apparent that Johnson's decision to report Friis's behavior in January 2005 was not to prevent Friis from further harassing her. Rather, her reason for reporting Friis was because she was upset because she thought he changed her grade, and she wanted to be

compensated for his actions. In her written complaint of sexual harassment to NIC, Johnson stated that "the reason I decided to make a formal complaint is so that I can try and put all of this behind me." *Castleton Aff.,* Exh. J, sub-exhibit A, p. NIC 534. In telling NIC what she wanted done as a result of her reporting Friis's behavior, she stated she would like her grade changed in Friis's computer class and to have her financial aid concerns addressed so she could finish her schooling at NIC without having to pay for her classes during the Spring 2004 semester. She then stated: "I would like to see the wrongs that were done made right, so I can go forward in a positive, empowered, and prideful way once again." *Id.* at p. NIC 535. Johnson says nothing about wanting to report Friis's behavior in order to stop it or to prevent it from happening again, and it is clear that by the time Johnson reported Friis's conduct she did not believe she was ever going to interact with him again. She simply wanted to seek compensation.

This is in stark contrast with the principles and purposes of Title VII and the *Faragher/Ellerth* structure of combating sexual harassment.

> Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress's intention to promote conciliation rather than litigation in the Title VII context. To the extent limiting employer liability could *encourage employees to report harassing conduct before it becomes severe or pervasive*, it would also serve Title VII's deterrent purposes. As we have observed, Title VII borrows from tort law the avoidable consequences doctrine, and the considerations which animate that doctrine would also support the limitation of employer liability in certain circumstances.

Ellerth, 524 U.S. at 764 (emphasis added). As demonstrated above, the purpose of this system is to allow NIC to curb sexually harassing behavior before it rises to the level of discrimination. Johnson was not seeking to curb Friis's behavior in reporting him to NIC; rather, she was seeking recompense for his past actions. "[T]he reporting requirement [of *Faragher/Ellerth*] serves the primary objective

of Title VII *which is not to provide redress but to avoid harm.*" *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 267 (4th Cir. 2001) (emphasis added).

As the Court is well aware, Johnson's sole remaining claim in this lawsuit is one for *respondeat superior* liability to NIC. This Court has found no factual dispute that NIC did not know about Friis's conduct until Johnson reported it in January 2005, and that NIC took prompt and appropriate action to address these claims once it learned of them. Johnson is seeking to make NIC vicariously liable for the conduct of one of its employers, of which conduct NIC was not aware, and as such Johnson must be able with overcome NIC's *Faragher* affirmative defense.[5] This affirmative defense is specific to NIC and its actions throughout the course of the factual events of this case. Johnson can only prevail on a claim of vicarious liability against NIC if she proves that NIC did something wrong in the process, whether by failing to have a policy or procedure in place to address harassment (prong 1), or by doing something to Johnson to cause her to reasonably and objectively believe a report of sexual harassment to NIC would not possibly lead to the discontinuance of Friis's behavior (prong 2).

Johnson failed to fulfill her duties under Title VII by promptly reporting Friis's harassing behavior before it could become severe or pervasive. Instead, she waited until after her interaction with him had ended and filed her report because she mistakenly thought he had changed her grade. Johnson never gave NIC its opportunity to fulfill its opportunity to curb Friis's behavior early on. Her report was filed to seek compensation for damages, not to stop harassing behavior.

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[5]NIC having already established that Johnson suffered no adverse educational action at the hands of Friis, thus making it eligible to attempt to assert the *Faragher* affirmative defense.

III.
CONCLUSION

Johnson never gave NIC the opportunity to correct Friis's behavior towards her, and NIC did nothing that would ever objectively and reasonably cause Johnson to believe NIC would handle the situation with Friis any different than the way it actually did when she made her report in 2005. Johnson has failed to provide any factual allegation that, if believed by a jury at trial, would justify her delay in reporting Friis's behavior as a matter of law. Whether a jury believes Johnson's reasons for delaying her report to NIC are reasonable must be judged in light of the *Faragher/Ellerth* standard as established in the cases above. A subjective and unsubstantiated fear of retaliation is, as a matter of law, not a justification for delay. Most, if not all, persons reporting sexual harassment against a supervisor will experience a fear of retaliation. Such a feeling is inherent in the very act of reporting harassment. The *Faragher* and *Ellerth* courts knew this, and yet they still required victims of harassment to report to the employer in order to preserve a claim of vicarious liability against the employer. Johnson had no objective and credible reason to believe she would experience retaliation if she did not accept Friis's advances.[6]

Johnson's desire to maintain her "I" grade in Friis's class is not, as a matter of law, justification for her delay in reporting Friis's conduct to NIC. Nothing in the litany of *Faragher/Ellerth* cases even suggests that a desire to retain the benefits that flow from a relationship based on sexual harassment excuses reporting the harassment.

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[6]In fact, Johnson *never did give in* to Friis's advances. The evidence is undisputed that he repeatedly asked her on dates and she repeatedly rejected those invitations. And Friis never took any negative action against her, but instead gave her preferential treatment when he allowed her the "I" grade. It is unclear how, given this clear pattern of behavior between them, Johnson could have reasonably been afraid that her failure to give in to his advances would result in retaliation.

Likewise, Johnson's belief that Friis's behavior may improve is not, as a matter of law, justification for her delay.[7] Again, nothing in the *Faragher/Ellerth* cases establish this as a reasonable purpose of delaying a report of harassment. Certainly by the start of the Spring 2004 semester, when Johnson alleges Friis's harassing behavior began again, she knew his behavior would not improve, and that hoping the same wasn't going to change that. *McMillan Aff.*, Exh. A, ¶ 3.

As the cases above make clear, the only real justification available to Johnson for delaying or failing to report sexual harassment to NIC would be if NIC did something either directly or indirectly that gave Johnson an objective, substantiated, and credible belief that her report of sexual harassment would not have been heeded by NIC. This never happened, and NIC demonstrated the exact opposite response when Johnson finally reported Friis in 2005.

Accordingly, NIC has plainly shown that Johnson has failed to establish a genuine issue of material fact as to whether she unreasonably delayed her reporting of Friis's harassing behavior. NIC fully fulfilled its responsibilities under the *Faragher/Ellerth* structure, while Johnson completely failed to fulfill hers, entirely preventing NIC from doing anything to stop Friis's behavior towards her when it was occurring. Having fully fulfilled its obligations to Johnson, and Johnson having failed to do the same, NIC should not have to stand trial on this issue.

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[7]Nor has Johnson ever argued that this was a reason she did not report Friis. Rather, she contends it was the reason she decided to take his class again in 2004 despite his alleged harassment towards her in 2001. *See* Plaintiff's Opposition to NIC's MSJ, *Affidavit of James McMillan,* Exh. A, ¶ 2.

Dated this 26th day of October, 2010.

NAYLOR & HALES, P.C.

By _____
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Attorneys for Defendant North Idaho College

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of October, 2010, I caused to be served, by the method(s) indicated, a true and correct copy of the foregoing upon:

James McMillan Attorney at Law 415 Seventh Street, Ste. 7 Wallace, ID 83873 *Attorney for Plaintiff*	X ___ ___ ___	U.S. Mail Hand Delivered Federal Express Fax Transmission (208) 752-1900
Peter C. Erbland Paine Hamblen, LLP 701 Front Ave., Ste. 101 P.O. Box E Coeur d'Alene, ID 83816-2530 *Attorneys for Def. Friis*	X ___ ___ ___	U.S. Mail Hand Delivered Federal Express Fax Transmission (208) 664-6338

Bruce J. Castleton

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STATE OF IDAHO } SS
COUNTY OF KOOTENAI
FILED: #1135
2010 DEC 10 PM 4:19
CLERK DISTRICT COURT
DEPUTY

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ISB # 7523
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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

VICTORIA JOHNSON, Plaintiff, vs. NORTH IDAHO COLLEGE, an Idaho Corporation, and DONALD FRIIS, an individual Defendants.	Case No. CV-06-7150 **PLAINTIFF'S OBJECTION TO DEFENDANT NORTH IDAHO COLLEGE'S MOTION FOR RECONSIDERATION**

COMES NOW the Plaintiff, VICTORIA JOHNSON, by and through her Counsel of Record JAMES McMILLAN, Attorney at Law, and hereby respectfully moves this Court for its Order DENYING Defendant's Motion for Reconsideration and submits her Memorandum in Opposition to Defendant's Motion for Reconsideration as follows:

I. INTRODUCTION

The facts and procedural history in this matter have been set forth on numerous occasions in the parties' respective pleadings, briefs, and memoranda throughout the course of litigation on this matter. As such, Plaintiff's prior recitations of the facts and procedure of this case are hereby

expressly incorporated by reference as though fully set forth herein.

On October 15, 2010, this Court entered its Memorandum Decision and Order denying Defendant's Motion for Summary Judgment. On or about October 26, 2010, Defendant filed its Motion for Reconsideration, which is now before the Court. In its Motion, Defendant narrows its argument to the *Faragher* affirmative defense, and the reasonableness of the timing of Plaintiff's report of Friis' offending behavior. Motion for Reconsideration at 4–16. Nevertheless, this Court should affirm its previous decision and DENY Defendant's Motion for Reconsideration for the reasons set forth below.

II. ARGUMENT

The primary focus of Defendant's argument is this Court's correct finding that a reasonable jury could conclude that any delay in bringing the formal complaint of harassment was reasonable. Memorandum Decision and Order at 8. In doing so, Defendant cites and quotes from a number of cases in which various courts had held that a fear of retaliation was insufficient to justify a failure to report or delay in reporting. Motion for Reconsideration at 7–11. Defendant also claims that these cases stand for the proposition that a fear of retaliation is not reasonable as a "matter of law." *Id.*

Initially, a review of the cases cited by Defendant shows that, in *none* of said cases, does the court therein make a definitive ruling that a fear of retaliation is insufficient as a matter of law; rather, the courts in those cases simply found that, based upon *the record therein*, the plaintiffs *therein* had failed to show that their fear of retaliation was sufficient in *those particular cases* in order to justify a failure to, or delay in, reporting the offending behavior. In this case, the record is *clear* as to Plaintiff's reasons, as summarized on Page 8 of this Court's Order.

Additionally, Plaintiff's fears that her grade may be affected by her response to Friis' advances, Affidavit of Victoria Johnson, ¶¶ 6 and 8 (Federal Proceeding, Docket No. 66); in

addition to similar fears on the part of other students, *see* Affidavit of Michelle Cook, ¶ 5 (Federal Proceeding, Docket No. 67), and that fact that Plaintiff believed that she would be required to take Friis' class a pre-requisite to graduation, Affidavit of Victoria Johnson, ¶ 7 (Federal Proceeding, Docket No. 66) would allow a rational trier of fact to draw a reasonable conclusion that Plaintiff's delay in filing the formal complaint was *entirely reasonable*, as this Court correctly found following hearing on Summary Judgment. The cases cited by Defendant, while they are certainly examples of Courts finding to the contrary, do not establish a legal precedent that such fear is unreasonable as a *matter of law*. Once again, while Defendant NIC is perfectly free to argue its affirmative defense at trial, the weight of evidence on the record, viewed in a light most favorable to the non-movant, does *not* create a lack of a genuine issue of material fact regarding said defense. As such, Summary Judgment *remains* inappropriate regarding Defendants' affirmative defense and, therefore, Defendant's Motion should be DENIED

Furthermore, on the remaining elements of the defense, there remains a genuine issue of material fact, such that a rational trier of could reasonably find, that Defendant NIC did *not* exercise reasonable care in "preventing and correcting promptly" Friis' sexually harassing behavior. According to Plaintiff's Affidavit, despite being placed on notice of Defendant Friis' behavior, Defendant NIC failed to take any action. Affidavit of Victoria Johnson, ¶ 11 (Federal Proceeding, Docket No. 66). Moreover, NIC had been placed on notice regarding previous incidents involving other students, and, yet, failed to remove Friis from the classroom, provide additional supervision, or otherwise provide prevent the harassment at issue. *Id.* at ¶¶ 12–13 ; Affidavit of Rami Amaro, Exhibits A and B (Federal Proceeding, Docket No. 65); Affidavit of Michelle Cook, ¶ 6 (Federal Proceeding, Docket No. 67). Again, while Defendant is certainly free to argue this element of its affirmative defense at trial, the record, viewed in a light most

favorable to the non-moving party, does *not* warrant a grant of Summary Judgment upon said Defense, and this Court's prior decision should be affirmed.

On the next element, it also remains that there is a genuine issue of material fact, such that a rational trier of could reasonably find, that the plaintiff did *not* unreasonably fail to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Initially, in addition to the actual notice regarding the harassment of the other students, Plaintiff *did* note her discomfort regarding Friis' behavior to NIC staff members, prior to filing the formal complaint. Affidavit of Victoria Johnson, ¶ 11.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, Defendant NIC's Motion for Reonsideration should be DENIED.

DATED this 10th day of December, 2010.

JAMES McMILLAN

Attorney for Plaintiff.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of December, 2010, I caused to be served a true and correct copy of the foregoing to the following, by the method indicated below:

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Attorneys for Defendant North Idaho College

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

VICTORIA JOHNSON, Plaintiff, vs. NORTH IDAHO COLLEGE, an Idaho corporation, and DONALD FRIIS, an individual, Defendants.	Case No. CV06-7150 **DEFENDANT NORTH IDAHO COLLEGE'S REPLY TO PLAINTIFF'S OBJECTION TO DEFENDANT NIC'S MOTION FOR RECONSIDERATION**

Defendant North Idaho College ("NIC"), by and through its counsel of record, Naylor & Hales, P.C., hereby files Reply Memorandum for its Motion for Reconsideration. For the reasons stated below, this Court should disregard the objections raised by Plaintiff in her Objection and grant Defendant NIC's Motion.

ARGUMENT

I. Plaintiff's Argument as to the *Faragher-Ellerth* Rule is Without Merit

In her Objection to Defendant NIC's Motion for Reconsideration Plaintiff asks this Court to review the numerous cases cited by NIC in its Motion for Reconsideration and find that none of

those cases stand for the proposition that a generalized fear of retaliation is insufficient as a matter of law to justify a delay in reporting sexual harassment under the *Faragher-Ellerth* affirmative defense. Without citing to a single case or other authority to support her Objection, Plaintiff asks this Court to disregard numerous pertinent cases issued by federal courts that are squarely on point with the issue at question for no reason other than immaterial and unspecified factual differences between those cases and the present proceeding. This rationale would serve to do no less than to ignore the plain language of those decisions and subvert the very jurisprudential process.

The cases cited by NIC in its Motion for Reconsideration set forth a clear standard of law applicable to the *Faragher-Ellerth* affirmative defense. This standard is: absent extreme circumstances creating a substantiated and specific threat of retaliation, a generalized fear of retaliation for reporting sexual harassment does not constitute a valid basis for not reporting that sexual harassment, and a failure by the employee to report harassment on that basis is unreasonable and thus enables an employer to meet the second prong of the *Faragher-Ellerth* affirmative defense. What Plaintiff will not acknowledge is that those numerous cases cited by NIC in its Motion for Reconsideration *do* establish that very rule as a matter of law. That is the very plain and unequivocal holdings of those rulings.

A. Cases Do State This Rule Specifically

Plaintiff argues in her Objection: "Initially, a review of the cases cited by Defendant shows that, in *none* of said cases, does the court therein make a definitive ruling that a fear of retaliation is insufficient as a matter of law...." Objection, p. 2 (emphasis in original). Plaintiff apparently failed to read the cases cited. In the Eighth Circuit case of *Adams v. O'Reilly Automotive, Inc.*, 538 F.3d 926, 932-33 (2008) (cited on p. 8 of NIC's Motion for Reconsideration), the court held that

"[w]e do not believe that a fear of retaliation is generally a proper excuse for failing to report sexual harassment." The Court then found that the employer, O'Reilly, "has demonstrated the unreasonableness of Ms. Adam's failure to report Mr. Schroeder's harassment sooner, and that O'Reilly has thus established the second element of the *Ellerth-Faragher* defense." The court then concluded: "Having successfully established both elements of the *Ellerth-Faragher* defense *as a matter of law*, we hold that O'Reilly was entitled to summary judgment" (emphasis added). The Eight Circuit held plainly in that case that a generalized fear of retaliation is unreasonable as a matter of law.

In *Verges v. Shelby County Sheriff's Office*, 2010 WL 2696764 (W.D. Tenn.) (cited on p. 9 of NIC's brief) the rule was more succinctly stated, wherein the court plainly held that a "generalized fear of retaliation, unaccompanied by an objective evidence to substantiate that fear, however, is, *as a matter of law*, insufficient to justify an employee's failure to comply with a reporting policy" (emphasis added). In *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 246 (2nd Cir. 2001) (cited on pp. 10-11 of NIC's Motion) that court found that where in claiming fear of retaliation the employee "did not come forward with any such [credible evidence of retaliation], but instead simply asserted her apprehension that she would be fired for speaking up... [s]uch conclusory assertions fail *as a matter of law* to constitute sufficient evidence to establish that her fear was credible...." And in *Weger v. City of Ladue*, 500 F.3d 710, 726 (8th Cir. 2007) (cited on p. 10 of NIC's brief), that court held that where plaintiff's only excuse for failing to timely report sexual harassment was a general fear of retaliation, "[w]e, therefore, find plaintiff's unreasonably delayed reporting Baldwin's harassment, satisfying the second element of the affirmative defense *as a matter of law*." The language in these cases is abundantly transparent.

The other cases cited by NIC carry the same holding regardless of whether their language is as specific as those cited above. The rules enunciated by those courts are clearly consistent and uniform with those cases above that contain the phrase to the effect that the delay is unreasonable "as a matter of law." Plaintiff's quibbling over this issue is both faulty and without justification.

More so, contrary to the Plaintiff's assertions, the cases cited by NIC are not factually distinguishable in any material sense from the present proceeding, as the plaintiffs in those cases did the very same thing now done by Ms. Johnson: they attempted to excuse their failure to timely report sexual harassment on a speculative and generalized fear of retaliation. And in each one of those cases, the courts found that as a matter of law such an excuse was without merit. The courts in *Baldwin*, *Barrett*, and the other cases cited by NIC in its Motion, would have ruled no differently had they reviewed Johnson's factual circumstances instead. To argue that those cases would have been decided differently merely because of immaterial factual differences ignores the basic purpose of *stare decisis*. This Court is not required to formulate a new rule out of whole cloth with each case simply because it is dealing with different parties or minor factual variations when other courts have not only created a rule already, but have uniformly abided by that rule in its application.

B. <u>Those Cases Cited by NIC Demonstrate the Rationale of the Rule</u>

In its Motion for Reconsideration NIC cites to numerous cases that not only establish this rule as a matter of law, but which further explain *why* this is the law, going back to the very policy reasons behind Title VII and the U.S. Supreme Court's decisions in *Faragher* and *Ellerth*. The *Baldwin* case from the Eleventh Circuit (480 F.3d 1287), in particular, sets forth the very rationale why a generalized fear of retaliation cannot justify a failure to report harassment under Title VII (finding that the *Faragher-Ellerth* "plan is that the corresponding duties it places on the employers

and employees are designed to stop sexual harassment before it reaches the severe or pervasive stage amounting to discrimination," and therefore the U.S. Supreme Court "decided to require an employee to make the choice in favor of ending harassment [despite fear of retaliation] if she wanted to impose vicarious liability on her employer") (1306-07). The Fourth Circuit found in *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 267 (2001) that "[b]y advancing a speculative 'fear of retaliation' excuse for remaining silent, Barrett's argument would undermine the primary objective of Title VII and could result in more, not less, sexual harassment going undetected." *See* NIC's Motion for Reconsideration, pp. 7-11, 14-16.

These courts would not have invoked the underlying purpose and rationale of Title VII in their decisions had they merely meant to apply the rules they formulated to a single, isolated case. Rather, those courts went to the effort of expounding and explaining the rules they formulated so that other courts would have the understanding of the rule sufficient to apply it to other relevant cases.

C. <u>The Courts Cited Were Undertaking Statutory Interpretation</u>

Perhaps the most important issue to be noted in correcting Plaintiff's assertions about the numerous cases finding this standard of law enunciated above is the fact that the cases cited by NIC with regards to the *Faragher-Ellerth* affirmative defense constitute those courts' judicial interpretation of Title VII. As this Court knows well, the *Faragher-Ellerth* affirmative defense is a judicially-carved test to determine whether an employer may be exempt from vicarious liability for a supervisor's sexual harassment of a subordinate under Title VII. Thus, these courts' decisions in establishing that a generalized fear of retaliation is, as a matter of law, an unreasonable excuse for failing to timely report the harassment, are interpretations of Title VII as well. The Idaho Code sets forth: "All questions of law arising upon the trial, including ... the construction of statutes and other

writings ... are to be decided by the court when submitted and before the trial proceeds...." I.C. § 9-102. Thus, this Court also has the power and responsibility of interpreting Title VII here, particularly where no other Idaho court has done the same as to this issue.[1] This is a question of law for the Court, not a question of fact for the jury.

Defendant NIC is asking this Court to: (1) interpret the IHRA and rule consistent with the numerous federal jurisdictions cited in its Motion to find that, as a matter of law, a generalized fear of retaliation does not excuse an employee from reporting sexual harassment under the Title VII framework and the *Faragher-Ellerth* doctrine; and (2) accordingly find that under this rule, Johnson's claim of vicarious liability against NIC fails as a matter of law because she unreasonably delayed reporting Friis's harassment, and her excuse for that delay of a non-specific, generalized fear of retaliation is unreasonable as a matter of law.

Rule 56(c) holds that this Court should render summary judgment if, upon viewing the evidence before it, "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." NIC does not dispute Plaintiff's assertion that her reasons

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[1]As already cited by NIC, the Idaho Supreme Court has consistently stated that Idaho Code § 67-5901 (the statement of purpose of the Idaho Human Rights Act) "allows our state courts to look to federal law for guidance when interpreting the Idaho Human Rights Act." *Stout v. Key Training Corp.*, 144 Idaho 195, 197 (2007). In *Stansbury v. Blue Cross of Idaho Health Svc., Inc.*, 128 Idaho 682, 685 (1996) the Idaho Supreme Court held: "When this Court has not had occasion, as here, to determine the standards applicable to the adjudication of state claims patterned on a federal law, this Court may look to that body of federal law for guidance." In that case that Idaho court relied upon Ninth Circuit law applicable to the ADA in interpreting the IHRA, finding that where a plaintiff alleges intentional disability discrimination under the ADA, and the employer disavows any reliance upon the disability in making the employment decision, the analytical framework of Title VII cases should be employed. *Id.* This, as in this case, is a judicially-created rule, which rule was derived from the ADA by the Ninth Circuit in treating certain instances of alleged employer disability discrimination. Here, NIC is calling upon this Court to make the same type of interpretation of the IHRA based on the multitude of federal legal precedent cited in its brief, including cases from the Ninth Circuit.

for failing to report Friis's alleged harassment are clear (Objection, p. 2). Thus, there is no question of fact as to *why* Ms. Johnson claims she failed to report the harassment. The only question remaining as to *Faragher*, then, is whether those proffered reasons constitute a justifiable delay in reporting harassment as a matter of law.

Plaintiff urges this Court to find that this remaining issue is a question of fact. If the question of the reasonableness of Johnson's delay was one that could be decided with no other factors or standards attendant, then Plaintiff could be right. However, the courts interpreting Title VII have found that there are certain situations that, when factually uncontested, dictate a finding for the employer as a matter of law. Ms. Johnson's case falls squarely within that circumstance, as the courts cited have uniformly held that, under the *Faragher* defense when an employee fails to timely report sexual harassment only because she had a generalized fear of retaliation, this failure is unreasonable as a matter of law, precluding that issue's consideration by a jury. Thus, NIC's Motion for Reconsideration should be granted and it should be granted summary judgment on Plaintiff's remaining claim.

II. Plaintiff is Incorrect in Asserting There are Any More Unresolved Claims

Plaintiff asserts in her Objection that there remains a genuine issue of material fact as to the first prong of the *Faragher-Ellerth* affirmative defense, asserting that a trier of fact could find that NIC did not exercise reasonable care to prevent and promptly correct Friis's behavior. Objection, p. 3. This Court's Memorandum Decision and Order says otherwise. This Court has ruled: "The record before this Court is clear that NIC took reasonable care to prevent and promptly correct such an alleged discriminatory situation...." Memorandum Decision and Order re: Defendant's Motion for Summary Judgment, p. 8. The first prong has been satisfied by NIC, and the only question

remaining before this Court is whether Johnson's delay in reporting the harassment is unreasonable as a matter of law.

CONCLUSION

For the reasons stated herein and in Defendant NIC's Motion for Reconsideration, the Motion should be granted and Plaintiff's sole remaining claim against NIC should be dismissed with prejudice.

Dated this 15th day of December, 2010.

NAYLOR & HALES, P.C.

By _____
Bruce J. Castleton, Of the Firm
Attorneys for Defendant North Idaho College

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of December, 2010, I caused to be served, by the method(s) indicated, a true and correct copy of the foregoing upon:

James McMillan Attorney at Law 415 Seventh Street, Ste. 7 Wallace, ID 83873 *Attorney for Plaintiff*	___ ___ ___ X	U.S. Mail Hand Delivered Federal Express Fax Transmission (208) 752-1900
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Bruce J. Castleton

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Attorneys for Defendant North Idaho College

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

VICTORIA JOHNSON, Plaintiff, vs. NORTH IDAHO COLLEGE, an Idaho corporation, and DONALD FRIIS, an individual, Defendants.	Case No. CV06-7150 **ORDER**

For the reasons set forth in this Court's oral decision announced in open court on January 11, 2011 at 1:30 p.m. Pacific Time, the Court hereby **GRANTS** Defendant North Idaho College's Motion for Reconsideration; **VACATES AND RESCINDS** the Court's Memorandum Decision and Order re: Defendant North Idaho College's Motion for Summary Judgment filed on October 15, 2010; and **GRANTS** North Idaho College's Motion for Summary Judgment in its entirety.

Plaintiff Johnson's remaining claims as against Defendant North Idaho College are hereby dismissed **with prejudice**.

DATED this 18 day of January, 2011.

Lansing L. Haynes
LANSING L. HAYNES
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21 day of Jan., 2011, I caused to be served, by United States Mail, a true and correct copy of the foregoing upon:

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Attorneys for Defendant NIC

CLIFFORD T. HAYES
~~DANIEL J. ENGLISH~~
KOOTENAI COUNTY CLERK

By: _____
Deputy Clerk

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Attorneys for Defendant North Idaho College

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

VICTORIA JOHNSON, Plaintiff, vs. NORTH IDAHO COLLEGE, an Idaho corporation, and DONALD FRIIS, an individual, Defendants.	Case No. CV06-7150 **JUDGMENT**

This case having been resolved through this Court's grant of summary judgment to Defendant North Idaho College, and all other claims having been previously adjudicated,

IT IS HEREBY ORDERED that Plaintiff's claims are dismissed with prejudice, and this case is now deemed closed.

DATED this 18 day of January, 2011.

Lansing L. Haynes
LANSING L. HAYNES
District Judge

JUDGMENT - 1.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21 day of Jan., 2011, I caused to be served, by United States Mail, a true and correct copy of the foregoing upon:

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Attorneys for Defendant NIC

CLIFFORD T. HAYES
~~DANIEL J. ENGLISH~~
KOOTENAI COUNTY CLERK

By: _____
Deputy Clerk

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

VICTORIA JOHNSON, Plaintiff, vs. NORTH IDAHO COLLEGE, an Idaho Corporation, and DONALD FRIIS, an individual Defendants.	Case No. CV-06-7150 **NOTICE OF APPEAL** **Fee Category: L.4** **Fee: $101**

TO: CLERK OF THE SUPREME COURT OF THE STATE OF IDAHO AND TO THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AND TO: Defendant North Idaho College and its attorneys, Kirtlan G. Naylor and Bruce J. Castleton, Naylor & Hales, P.C., 950 W. Bannock, Ste. 610 Boise, ID 83702

Defendant Donald Friis and his attorney, Peter C. Erbland Paine Hamblen, L.L.P., 701 Front Ave., P.O. Box E, Coeur d'Alene, ID 83816

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellant, VICTORIA JOHNSON, appeals against each and every one of the above-named Respondents, NORTH IDAHO COLLEGE, et al., to the Idaho Supreme Court from the Order and final judgment granting Summary Judgement to Defendants, entered in the above-entitled action on the 21st day of January, 2011, by the Honorable Judge Haynes, presiding;

2. The Appellant has the right to appeal to the Idaho Supreme Court Court, and the Decision described in Paragraph 1 above is appealable under and pursuant to I.A.R. 11(a)(1);

3. This appeal is taken upon matters of both law and fact. The preliminary statement of issues on appeal is as follows:

   a. Did the District Court err in granting Summary Judgment to Defendants on the grounds that there was no genuine issue of material fact, thus entitling them to a judgment as a matter of law with regard to their affirmative defenses raised to Plaintiff's claims?

   b. Did the District Court err in granting Defendant North Idaho College's Motion for Reconsideration.

4. No order has been entered sealing any portion of the Record.

5. A reporter's transcript is requested for the following hearings:

   a. Motion for Summary Judgment, September 8, 2010;

   b. Status Conference, November 1, 2010;

   c. Motion for Reconsideration, December 17, 2010; and

   d. Decision, January 11, 2011.

   Said transcripts may be condensed.

6. The Plaintiff/Appellant further requests that the following documents be included in the Clerk's record *in addition* to any automatically included pursuant to Rule 28, I.A.R.:

1) The record on remand from the United States District Court for the District of Idaho;
2) Defendants' Motion for Summary Judgment and all supporting Affidavits and Memoranda;
3) Plaintiff's Objection to Defendants' Motion for Summary Judgment and all supporting Affidavits and Memoranda;
4) Defendants' Motion for Reconsideration and all supporting Affidavits and Memoranda Objection to Defendants' Motion for Reconsideration and all supporting Affidavits and Memoranda;
5) Any and all documents listed under Idaho Appellate Rule 28(b)(1).

7. I certify:

a. That one original and two copies have been filed with the District Court;

b. That a copy has been served upon the Court's court reporter;

c. That payment has been made to the Clerk of the Court for the estimated fee for preparation of the reporter's transcript

d. That the Appellants' filing fee has been paid; and

e. That service has been made upon all parties required to be served by Rule 20.

DATED this 3d day of March, 2011.

JAMES McMILLAN,

James McMillan
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3d day of March, 2011, I caused to be served a true and correct copy of the foregoing to the following, by the method indicated below:

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Coeur d'Alene, ID 83816-9000

__X__ U.S. Mail
____ Overnight Mail
____ Hand Delivered
____ Facsimile to:

James McMillan

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

VICTORIA JOHNSON,	)	
	)	
Petitioner/Plaintiff	)	
	)	**SUPREME COURT NO. 38605-2011**
vs	)	
	)	
NORTH IDAHO COLLEGE, an Idaho corporation, and DONALD FRIIS, an individual,	)	
	)	
Respondents/Defendants	)	
	)	

Attorney for Appellant

James McMillan
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Wallace, ID 83873

Attorneys for Respondents

Bruce J. Castleton
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Boise, ID 83702

Peter C. Erbland
PO Box E
Coeur d'Alene, ID 83814

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Kootenai, Idaho this 21st day of September, 2011.

CLIFFORD T. HAYES
Clerk of the District Court

By _____
Deputy Clerk

FIRST JUDICIAL DISTRICT KOOTENAI COUNTY STATE OF IDAHO CLERK OF COURT

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

VICTORIA JOHNSON,	)	
	)	
Petitioner/Plaintiff	)	
	)	**SUPREME COURT NO. 38605-2011**
vs	)	
	)	
NORTH IDAHO COLLEGE, an Idaho corporation, and DONALD FRIIS, an individual,	)	
	)	
Respondents/Defendants	)	
	)	

CLERK'S CERTIFICATE OF SERVICE

I, Clifford T. Hayes, Clerk of District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that I have personally served or mailed, by United States mail, one copy of the Clerk's Record to each of the Attorneys of Record in this cause as follows:

Attorney for Appellant

James McMillan
417 Seventh St, Ste 7
Wallace, ID 83873

Attorneys for Respondents

Bruce J. Castleton
950 W Bannock St., Ste 610
Boise, ID 83702

Peter C. Erbland
PO Box E
Coeur d'Alene, ID 83814

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Kootenai, Idaho this 21st day of April, 2011.

CLIFFORD T. HAYES
Clerk of the District Court

By: _____
Deputy Clerk

FIRST JUDICIAL DISTRICT KOOTENAI COUNTY STATE OF IDAHO CLERK OF COURT